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EXPORT ADMINISTRATION ACT OF 1983

HEARING

BEFORE THE

SUBCOMMITTEE ON INTERNATIONAL TRADE

OF THE

COMMITTEE ON FINANCE

UNITED STATES SENATE

NINETY-EIGHTH CONGRESS

FIRST SESSION

ON

S. 979

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EXPORT ADMINISTRATION ACT OF 1983

THURSDAY, AUGUST 4, 1983

U.S. SENATE,
COMMITTEE ON FINANCE,
SUBCOMMITTEE ON INTERNATIONAL TRADE,
Washington, D.C.

The committee met, pursuant to notice, at 10:40 a.m., in room SD-215, Dirksen Senate Office Building, Hon. John C. Danforth (chairman) presiding.

Present: Senators Danforth, Dole, Chafee, Heinz, Grassley, Symms, Baucus, Long, and Bradley.

[The press release announcing the hearing and the prepared statements of Senators Dole, Heinz, Baucus, and Grassley follow:]

PRESS RELEASE OF JULY 26, 1983

Senator John C. Danforth (R., Mo.), Chairman of the Subcommittee on International Trade of the Committee on Finance, today announced that the Subcommittee would hear testimony on Thursday, August 4, on matters within the jurisdiction of the Committee on Finance contained in S. 979, the Export Administration Act Amendments of 1983.

The hearing will commence immediately following a previously scheduled hearing on the Administration's plans for renewal of the Generalized System of Preferences. The latter hearing will begin at 9:30 a.m. in room SD-215 of the Dirksen Senate Office Building.

In announcing the hearing, Chairman Danforth noted that the Committee on Banking, Housing, and Urban Affairs recently reported S. 979, a bill to reauthorize the 1979 Export Administration Act, with several amendments to existing law. In general, that act authorizes the President to regulate exports to protect the national security, to further foreign policy goals, and to preserve scarce materials. This authority expires on September 30, 1983.

As reported by the Banking Committee, S. 979 contains amendments falling principally within the jurisdiction of the Committee on Finance, including: (1) Section 6(a) of the Act is amended to authorize the President to impose import controls against a country with respect to which he has imposed export controls based on foreign policy reasons; (2) Section 11(c) of the Act is amended by adding a new subsection (4) to authorize the President to punish entities which violate U.S. or multilaterally agreed-upon national security export controls by denying such entities the privilege of importing goods or technology into the United States; and (3) Sections 11 and 12 of the Act are amended to designate the Commissioner of Customs as the official with authority to enforce the Act, and to enhance the search and seizure powers of the Customs Service.

Chairman Danforth expressed his desire to limit testimony to these matters. With regard to the provisions for import controls, witnesses are asked to address in particular the utility of these additional enforcement powers, and the appropriateness of them in light of existing trade laws. With regard to the enhanced enforcement authority of the Customs Service, Chairman Danforth noted that when the Committee recently reported S. 1295, the Customs Service authorization for fiscal year 1984, it expressed strong concern with proposed cutbacks in existing Customs' commercial operations. Witnesses are asked to discuss the appropriateness of these new responsibilities, and the ability of the Service to accommodate them within existing budgetary constraints.

PREPARED STATEMENT OF SENATOR DOLE

Mr. Chairman: Senator Long and I have asked for this opportunity to consider S. 979 because several amendments to that bill fall within the jurdisdiction of the Committee on Finance and raise important questions which this subcommittee is especially competent to evaluate. I shall cooperate with the Banking Committee to avoid any unnecessary delay in Senate consideration of the bill and still carry out this Committee's wishes.

The use of export controls by the executive branch to carry out United States foreign policy and protect its national security may be an attractive alternative to more dramatic and costly measures, such as the use of armed force. I strongly support the President's efforts to control exports which contribute to the military power of our adversaries. But there can be no doubt that the use of export controls also entails its costs. The use of export controls to carry out U.S. foreign policy, sometimes involving pure symbolism, is particularly painful in an era when the United States' deficit in its balance of trade is growing to unprecedented proportions and the United States needs to protect its reputation as a reliable supplier.

Mr. Chairman, I am concerned that we consider carefully the implications of expanding the President's arsenal of export controls by adding authority to impose import controls. Use of this authority could justify retaliation against U.S. exports, particularly of agricultural commodities. It was my concern for agricultural exports that led me to join my Senate colleagues in proposing a constitutionally sound device which enables Congress by Joint Resolution to approve of export controls on agricultural products under the Export Administration Act.

The question for us today is not whether this or any other President has used export controls wisely or even whether he ought to have the authority to impose export controls. Rather, we must consider whether it is appropriate, as part of his export control authority, to grant the President unprecedented and unfettered discretion to impose import controls. Over the years, Congress, and this Committee in particular, have labored over laws which define the circumstances under which the President may impose import controls. These trade laws contain some of the most complex procedural requirements present in any laws. This elaborate framework reflects the concensus reached over many years between the Executive and the Congress, that the limitation on U.S. imports should be authorized in circumstances where such limitations do not invite damaging retaliation against our exports. The authority to impose import controls contained in S. 979 is a significant departure from their framework.

It is understandable that there should be support for permitting the President to impose on the exporters of a target country the costs which our own exporters must bear. But we must evaluate whether this added import authority will make the use of export controls more attractive and, therefore, more likely. If the United States is to enchance its reputation as a reliable supplier, we must ensure that export controls are used sparingly and only where they are effective in accomplishing important and tangible national goals. In evaluating the utility of granting the President this new import control authority, we must determine whether, in the long run, the use of this new power will pose an even greater threat to American exporters.

PREPARED STATEMENT OF SENATOR JOHN HEINZ

Mr. Chairman, I regret that this hearing is taking place. I believe it is unnecessary and unwise. Its only result will be to delay for at least five weeks the reenactment of a program vital to our national security and foreign policy objectives.

The Export Administration Act expires on September 30th. It will not be extended in its current form. I hope the action of this committee in delaying consideration of S. 979 will not jeopardize the enactment of the bill into law before that date.

In reviewing the issues under consideration today, let me make clear they are not new. In fact they have already been thoroughly discussed in 2 Committees. This year alone the Banking Committee has produced 1,400 pages of testimony from 54 groups and individuals on renewal of the EAA. This follows additional hearings last year on East-West trade and technology transfer in the Banking Committee (130 pages); on technology transfer to the Soviet Union, in the Governmental Affairs Committee (655 pages); and previously: on the Trans-Siberian natural gas pipeline, in 1981; on the grain embargo, in 1980; on the Office of Strategic Trade, in 1980.

In addition to these hearings, the Permanent Subcommittee on Investigations of the Committee on Governmental Affairs, recently undertook an extensive investigation of existing law, focusing, among other things on the Commerce Department's stewardship of the program. That report made a number of recommendations for improved enforcement of the Act which have been incorporated into this bill, including the transfer of enforcement responsibility to the Customs Service.

I should also mention a report by the Office of Technology Assessment titled "Technology and East-West Trade: An Update", which was issued May 6th of this year, and a similar report by the Central Intelligence Agency which appeared in unclassified form in 1982.

In short, Mr. Chairman, this law and this bill have been thoroughly and extensively analyzed in a process that has lasted more than a year and involved most of the nation's leading experts on the issues raised by the Act.

Nor are the provisions over which the Finance Committee has claimed jurisdiction new ones. They were introduced in various bills last February and were the subject of the hearings in the Banking Committee I just mentioned. The Committee decided to include these provisions in S. 979, and they are now integral parts of the bill.

S. 979 is a carefully crafted and delicately balanced compromise designed to reconcile the rights of exporters and their importance to our economy with our national security demands.

In the national security area, for example, the significant steps we have taken to downgrade controls on end products and facilitate the export of high technology products through a Comprehensive Operations License depend upon the tightening of enforcement that the bill also undertakes.

The most critical enforcement measure in the bill is the authority to impose import controls against companies that violate our laws or COCOM standards. Senator Garn and I, who wrote the bill, believe that this is the most effective tool we have to increase multilateral discipline over the transfer of technology to the Eastern bloc. Diversion of goods and technology, particularly U.S. items, from other Western consignees to the Soviet Union or other Eastern bloc nations is a major problem, and the President simply has to have the authority necessary to convince our allies and others in the West that we're serious about export controls. If we remove this authority, then the rationale for the COL and other pro-export provisions disappears as well.

A similar balance exists in the foreign policy control section. We have refocused the Act to emphasize controls that affect their intended target rather than controls that harm only American exporters. That is the premise for our foreign policy import controls: that we should prefer controls that have an impact on their target, as import controls would.

Balanced against these controls are the greater safegaurds for U.S. exporters, such as the contract sanctity provision. If we tilt the balance here as well, then we cannot expect these other provisions to stay in the bill.

I could go on, Mr. Chairman, but there is no need at this point. I hope the Committee will be able to resist the urge to tinker with the Banking Committee's consensus product. It is the result of long and careful study, thorough anlysis and good faith compromise. To remove a piece or two from this structure will cause the rest to collapse as well. At the proper time I will urge the Committee to defer to the judgment of those who have spent so much time on this bill already.

Prepared Statement of Senator Max Baucus

Mr. Chairman, I thank you for convening this hearing. I welcome the opportunity to review the Export Administration Act, which has so significant an impact on American exports.

As you know, my main concern is with Agricultural exports. Montana is a major exporter of, among other things, beef and wheat. But lately, Montana farmers have been beset by the same problems as the entire American agricultural community: exports are declining dramatically, this year as much as 9 percent.

Several reasons underly this decline.

The first reason is declining worldwide demand.

The second reason is the exchange rate misalignment, which currently constitutes about a 25 percent surcharge on U.S. wheat exports.

The third reason is unfair foreign trade practices. One unfair trade practice is Japan's system of quota and tariff barriers to U.S. beef imports; this system cuts U.S. beef sales by as much as $500 million. Another is the European Community's system of export subsidies for products like pasta and wheat flour; these subsidies threathen to force us out of traditional U.S. markets in Egypt and elswhere.

The fourth reason is U.S. export regulations, such as those in the Export Administration Act. The EAA performs critical national security foreign policy, and domestic supply functions. In the past, however, these functions have imposed counterproductive burdens on agriculture.

In 1980, President Carter invoked the national security and Foreign Policy controls to embargo grain sales to Russia, reducing U.S. sales there from the planned 25 million tons to the 7 million tons guaranteed in the existing long term agreement.

Overall, the embargo was unsuccessful. It reduced farm income, increased our competitors' market share, and created the impression that American farmers are unreliable suppliers. What's more, such embargoes usually have little foreign policy impact, because the target countries generally can find alternative sources of supply.

Given this history, it's important that we significantly limit agricultural embargoes.

The Banking Committee's version of S. 979 takes a long step in the right direction, by prohibiting the use of national security controls for agricultural commodities and by establishing a strong contract sanctity provision similar to the one included in last year's Commodity Futures Trading Act.

But S. 979 features a major, though probably inadvertent, drawback regarding the legislative veto. EAA Section 7(g) subjects certain agricultural embargoes to legislative veto. S. 979 would reauthorize section 7(g) without change.

Unfortunately, after the Banking Committee marked-up S. 979, the Supreme Court held all legislative vetos unconstitutional.

Given this holding, it's possible that the President's authority to embargo agricultural commodities now stands unconstrained by any significant Congressional participation.

This is unacceptable. We must replace section 7(g) with a provision which restores effective Congressional participation in the embargo decision-making process. This morning I hope to explore ways of doing so.

Turing to another matter, I also hope to explore the effect S. 979 will have on the Customs Service's administration of its traditional import-related functions.

A few months ago this Committee balked at an ill-conceived Customs "reorganization" plan. To make sure future reorganization plans were carefully conceived, we amended the Customs authorization to require Customs to give the Committee 90 days notice before any significant reorganization. That enables us to fully review the reorganization.

Now, S. 979 gives Customs significant new responsibility. We must assure that such responsibility can be carried out without impairing Custom's traditional functions.

I look forward to reviewing these and other questions, about the EAA, this morning.

PREPARED STATEMENT OF SENATOR CHARLES E. GRASSLEY

Mr. Chairman: I along with my colleagues, I believe all share the common goal of protecting vital U.S. National Security interest and improving enforcement of violations as embodied in the intent of the Export Administration Act.

Yet, I am compelled to reflect back into history of just a few short years ago when, under, in one case a Democrat Administration and most recently under a Republican Administration, one has to wonder if this nation's National Security and Economic interest were truly served by the "Grain Embargo" and the "Pipe Line Sanctions."

While I could get into a long dialogue on this matter should time permit, I will reserve that time for a later date since I realize we are here to address but three (3) provisions of this complex bill which fall into our jurisdiction.

Like most of you I have had letters from various entities of the business and farm sector on some of these provisions as well as from representatives from the European Community who have raised grave concerns regarding the extraterritorial provisions. And like most of my colleagues I am concerned that we do not once again shoot ourselves in the foot on sensitive trade matters.

The legislation we have before us today, and will have to vote on on the floor of the Senate, is vital not only to our National Security, but is also vitally important to our American business and farm community. It is for these reasons Mr. Chairman that I am deeply appreciative to you for providing us the opportunity, if only for a small portion of this entire Act, the privilege of hearing todays testimony and raising probing questions.

Senator **Danforth**. Our next subject is the Export Administration Act Amendments of 1983.

The first panel is the administration panel: Secretaries Olmer, McCormack, and Walker.

Mr. Olmer.

STATEMENT OF HON. LIONEL OLMER, UNDERSECRETARY OF COMMERCE FOR INTERNATIONAL TRADE

Mr. **Olmer**. Thank you very much, Senator Danforth. I have a written statement that I would like to introduce for the record, and a few brief comments to make at this time before responding to any questions that you have.

I have been asked to testify about certain provisions of S. 979, which relate to responsibility within the executive branch for the enforcement of the Export Administration Act, and to brand new authority to impose import controls as punishment for violations of national security controls, or as an adjunct to foreign policy export controls.

I welcome the opportunity coming as it does so close to the termination date of the existing law, September 30, 1983, and to the full Senate's consideration of a statute to replace the present law.

Our country very much needs an Export Administration Act. We've worked very hard over the last year to develop improvements on the present law, plugging up holes in the national security area, and in taking account of the concerns of the domestic and the international business community as well as those concerns of other governments.

I want to express our appreciation, especially to Senators Garn and Heinz, for their leadership in developing the Senate bill. We share common objectives. And it is with some regret that I must voice the administration's opposition to selected provisions of S. 979.

The administration opposes the import control provisions of S. 979, which you have asked me to testify about for two basic reasons. They won't help, in our judgment, improve national security or foreign policy interest. In fact, an argument might be made they might be harmful to both. And they would likely jeopardize the cooperative approach toward East-West trade, which has been steadily progressing within the Atlantic Alliance under this administration. And most especially, within the last 8 months.

This would result, in my judgment, because of the following: The administration has asked for the authority to impose import controls against any company which violates U.S. national security controls. As, for example, were a Swiss based subsidiary of an American corporation—exports of semiconductor manufacturing device in violation of a U.S. regulation. The Commerce Department now has the authority to place such a company on a denial list, and to prevent it from receiving any exports of any kind from the United States. We believe that the additional authority, which we have requested, to prevent it from exporting into the United States would be a powerful deterrent for potential violators, and would add significantly to our present export enforcement program.

But S. 979 goes beyond this formulation to provide import control authority even where U.S. law has not been violated. S. 979 would allow for a purely foreign company with a purely foreign product to be punished by the United States for violation of its country's laws.

The administration considered carefully and rejected asking Congress for the authority to impose import controls against countries when foreign policy export controls are also imposed. The President so determined because the use of such controls against a signatory to the General Agreement on Tariffs and Trade, the GATT, would violate our obligations under that treaty. The very existence of that provision could lead to strong protectionist pressures.

Moreover, it strikes me as flying in the face of our commitment to our Cocom partners to seek a common approach toward East-West trade.

You will recall, I am sure, that in December 1982 when President Reagan lifted the Polish related sanctions against the Soviet Union and its pipeline a program was announced committing the allies to four positions. One, a strengthening of Cocom, including the harmonization of enforcement procedures. Two, a commitment to refrain from developing a dependence on nonallied sources of energy. Three, to review the comprehensive basis for conducting East-West trade. And, four, to refrain from the granting of subsidized credits to the U.S.S.R.

This program is achieving progress, and we are pleased with the results thus far. The additional authority proposed in S. 979 is not needed, and is not wanted. Whether it would ever be used or not, it's embodiment in the law would offend our partners in Cocom.

I've reserved my last comment for the proposal to transfer responsibility to enforce the act from Commerce to Treasury. Congress long ago gave this responsibility to the Commerce Department, most recently reaffirmed in the 1979 Export Administration Act. After years of benign neglect, we've gotten around to doing a decent job. In fact, a pretty good job. And in putting together a permanent structure in the Department. The last 2 years we have tripled the number of enforcement personnel, taken the lead within Cocom in organizing that multinational effort toward harmonizing enforcement activities among all 15 member nations, a body where our people are respected and are looked to for leadership. We are creating the career service to attract quality personnel. Everyone has been or will be trained at the Federal Law Enforcement Academy. And we have established a better relationship than has ever existed with the business community whose cooperation is essential—I repeat, essential—to a successful, controlled program.

The administration's bill to extend the Export Administration Act of 1979 does not propose any change in the enforcement provision. The administration supports the current allocation of responsibility between the Department of Commerce and the U.S. Customs Service, and opposes consolidation of all enforcement activity within Customs. After much discussion of this issue, we believe that the current allocation of responsibility and resources are appropriate. Each agency brings a special strength to the effective enforcement of the EAA. Commerce is familiar with the strategic export controls and Customs is familiar with inspecting and processing cargo.

During this administration, both Commerce and Customs have substantially increased their export control enforcement efforts. Experience has taught us how much each agency can assist the other in carrying out our respective roles. We've acted on that experience by increasing our collaboration with each other.

For example, when Customs initiates a detention under the EAA of an export shipment, it refers the detention to Commerce to determine whether a violation of the export administration regulation has occurred. If a violation is found, Commerce would recommend that Customs seize the shipment. When Commerce effects a detention of its own, and a violation is found, Commerce asks Customs to seize the shipment on Commerce's behalf.

At Customs' request, Commerce is providing a training course on the export administration regulations for Customs' inspectors. Customs has several personnel detailed to the Commerce Office of Export Enforcement working with our staff. Their function is to facilitate the conveyance of licensing determinations to the Exodus Command Center. We will continue to make every effort to increase our collaboration.

If I might, Mr. Chairman, I would like to say a final word about the problem in general of the diversion of technology to potential adversaries, and the nature of technology.

It seems to me that it is precisely because of the nature of technology and how it has changed so dramatically in the last 10 years that our problem with its diversion is so large and so complicated. The development of the semiconductor itself and the pervasive application of semiconductors in virtually every facet of our lives is the most obvious manifestation of the phenomenon. What it has caused is the true multinationalization of technology. The United States is no longer in possession of unique ideas, or technology, of innovation or of sophisticated manufacturing. Defense-related systems themselves are no longer the embodiment of latest state-of-the art technology. Indeed, a personal computer now available from any 1 of more than 1,000 stores in the United States—soon to be perhaps 10,000 stores in the United States, and at least the equivalent number abroad—possesses more computing power than an IBM main frame computer of just a few years ago.

We have a problem that requires the application of the greatest amount of intelligence that not only this Nation but our Western alliance—and I include in that Japan—can bring to bear.

Thank you very much.

Senator DANFORTH. Thank you.

[The prepared statement of Mr. Olmer follows:]

PREPARED STATEMENT OF LIONEL H. OLMER
UNDER SECRETARY
FOR INTERNATIONAL TRADE ADMINISTRATION
DEPARTMENT OF COMMERCE
BEFORE THE
SUBCOMMITTEE ON INTERNATIONAL TRADE
FINANCE COMMITTEE
UNITED STATES SENATE

WASHINGTON, D. C.
August 4, 1983

Mr. Chairman, I appreciate the opportunity to discuss with this committee the import control and export enforcement provisions of S.979, a bill to amend and reauthorize the Export Administration Act of 1979. This Act requires a sensitive balance between essential national security and foreign policy interests, and our commitment to an open system of free trade. We are all keenly aware that exports mean jobs, and that a sound economy is essential to a strong America. Yet, at the same time, the protection of our national security and foreign policy interests is vital to the safety and well-being of our country and so must be balanced with our economic goals. The complexity of this task requires the best efforts of the Congress and the Administration, as well as the cooperation of the business community and our allies.

My comments will address those provisions of S. 979 related to import restrictions for violations of national security controls, import restrictions for reasons of foreign policy, and the transfer of export enforcement authority to the U.S. Customs Service.

Import Controls

S. 979 contains two provisions authorizing the imposition of import controls. We are concerned with both provisions. Although the State Department witness appearing before you this morning will give a more detailed analysis, I would like to outline our basic objections to both provisions.

First, section 9(7) of the bill authorizes the President to bar imports not only by any person who violates U.S. national security export controls, but also any person who violates any regulations issued by a COCOM country to implement COCOM multilateral controls.

We support that part of the provision which permits import sanctions on persons who violate U.S. national security controls. This much is consistent with the Administration's proposal on import sanctions. The purpose of such a sanction as purely an enforcement tool to be used in strengthening our overall control system. Such an import sanction against violators, as a measure taken to secure compliance with security-related export controls, would be consistent with international trade rule. We cannot support, however, that portion of the Senate provisions which authorizes U.S. import controls on violations of foreign laws or regulations which implement multilateral agreements. Providing a sanction under U.S. law for a violation of the laws of another country, even if related to multilaterally agreed controls, would be an unwarranted extension of jurisdiction. Rather than arrogate to ourselves the enforcement of foreign laws, we should continue our vigorous pursuit of enhanced enforcement measures by our allies.

Second, section 6(l) of S. 979 gives the President the authority to impose import controls on imports from a country against whom foreign policy export controls are imposed.

This broad authority to control imports is out of keeping with other language in S. 979 which proposes to curtail the President's authority to control exports. Additionally, we do not support this provision because it would risk challenge under the General Agreement on Tarriffs and Trade (GATT) were it to be applied against a GATT signatory. Our allies have already voiced this concern. Mr. Chairman, this measure would substantially undercut U.S. efforts to maintain a coherent trade policy as well as our efforts to expand the GATT to services and other areas of international trade.

Our major trading partners would most likely view this type of measure as a movement toward protectionism. They fear that we might take import restricting actions outside the context of GATT. Such actions could invite retaliation.

Enforcement

S. 979 proposes to transfer export enforcement responsibilities be transferred from the Department of Commerce to the U.S. Customs Service. The Administration continues to oppose this provision for a number of reasons.

First, Commerce has historically had primary responsibility for enforcement functions. In considering the current EAA's predecessor, the 1949 Export Control Act, the Investigations Subcommittee of the Senate Committee on Expenditures in the Executive Departments and the Special Senate Committee to Study the Problems of Small Business conducted a joint investigation of the export control program. The Investigations Subcomittee concluded that export enforcement and export licesning should reside in the same agency

The Administration supports this finding upon which present law is based. The agency with licensing responsibility must also have enforcement responsibility; effective licensing decisions must take into account enforcement-related information in order to prevent diversion schemes; and effective enforcement depends upon ready access to licensing technicians and daily licensing data. Commerce's Office of Export Enforcement currently works hand-in-hand with Commerce's export licensing side, sharing, analyzing and using intelligence, licensing and technical information to implement U.S. export controls.

The historical relationship between the Office of Export Enforcement and the licensing divisions has resulted in the ability of Commerce enforcement personnel to develop basic technical understanding of controlled technologies and commodities. This, in turn, is conducive to enforcement actions which are in harmony with licensing policy. Let me stress that this institutional knowledge has been built over many years and could not have been acquired were it not for the close physical proximity of the enforcement and licensing offices, and the daily on-going exchange of information.

The two offices' interrelationship goes even further; the Office of Export Enforcment's involvement in major export cases has resulted in Memoranda of Understanding between the U.S. and foreign governments which, in turn, establishes new U.S. licensing policy for exports to those countries. Thus, a given enforcement case can have substantial impact on our licensing policies with regard to a particular country.

Second, prior to passage of the 1949 Export Control Act, the Special Senate Committee to Study the Problems of Small Business also explained the relationship between the Department of Commerce's administration and enforcement functions and the Customs Bureau's support function. The Committee noted that it was necessary that Commerce's Office of International Trade and the Customs Bureau work together on the enforcement of export controls.

Mr. Chairman, we believe that effective export enforcement requires a close working relationship among all pertinent Federal law enforcement agencies and the intelligence community who can bring particular expertise and experience to bear on the problem. Thus, Commerce's Office of Export Enforcement special agents work closely on investigations with other agencies, not only Customs but the FBI, the CIA, and the Defense Intelligence Agency.

The Administration believes that it is especially important that all agencies work together to continue to improve enforcement of the Act. Indeed, the recognition of other agencies' particular areas of expertise was what prompted the Secretary of Commerce's original authorization, by regulation, to the U.S. Customs Service and U.S. Postmasters for inspection responsibilities and general authority to enforce the Export Administration Act. These two agencies were expressly selected not only because of their inspection expertise, but because they were already stationed at export channels and there was no need to duplicate their work by creating another inspection force.

Third, Commerce's Office of Export Enforcement focuses exclusively on strategic export control enforcement and our enforcement approach is geared toward the prevention of illegal exports or diversions to proscribed destinations. We can achieve this goal only through investigative efforts based on intelligence leads. Therefore, Commerce's investigative efforts are directed primarily against knowing and willful violators (as opposed to inadvertent) violators of U.S. export controls. We have different tools to achieve this end; among them:

1.) Private Sector Leads -- Commerce's frequent contacts and established working rapport with the business sector produces leads on potential or suspected violations. Most major export enforcement cases are built upon such information.

2.) Administrative sanctions -- Currently, Commerce alone has the authority to deny foreign violators future access to U.S. technology by putting them on a "denial list." This tool is crucial to both preventive and punitive enforcement since foreign violators are beyond U.S. criminal jurisdictional reach unless they are apprehended in the United States -- a circumstance that rarely occurs.

3.) Prosecution - our operational focus is to pursue willful violators of U.S. export controls and refer the cases to the Department of Justice for criminal prosecution. Prosecution, by its deterrent effect, also serves our preventive enforcement goal.

I would now like to bring to your attention Commerce's inspection program which, while only a small portion of our overall enforcement efforts, nevertheless plays an important role. In FY 82 our five inspectors conducted 9,124 inspections at seven principal ports and detained 584 shipments. Of these detentions, 242 resulted in seizures, which translates into an excellent seizure-to-detention ratio of 42.5%.

In the first nine months of FY 83, our inspectors conducted 6,678 inspections, detained 389 shipments. Of these detentions, 178 resulted in seizures. This shows an improved seizure-to-detention ratio of 48.4%.

Commerce also works closely with the Customs inspection program -- Operation Exodus. Our role in Operation Exodus, while narrow, is yet well defined, and important: Commerce provides licensing information to Customs upon request after Customs inspectors detain an export shipment on their own initiative. We assess the information provided by the Customs Service and the exporter and advise the Customs Service whether the shipment is seizable under Commerce's regulations.

With respect to Exodus, I would like to point out that our Office of Export Enforcement's record of seizure recommendations to Customs shows that Customs made 493 EAA related seizures (not including other seizures made by Exodus in enforcing other statutes) between July 1, 1982 and January 31, 1983. Of these seizures, 164 were violations detected by Commerce agents who had requested that Customs perform the seizures. OEE additionally reviewed the detention files pertaining to the other 329 violations that were detected by the Customs Service and recommended that they seize those shipments as well.

I must underscore, Mr. Chairman, that while cargo inspection is an important spot-check mechanism, detention and seizure statistics alone do not reflect willful violations of our licensing requirements, nor do they indicate the number of illegal diversions of U.S. technology. Instead, cargo inspection primarily catches those export violations resulting from exporters' inadvertent errors--either in not correctly reporting the commodity classification of their export, or not knowing that a validated export license was required. In other words, had the exporters had their papers in order, there would have been no strategic concern with their exports since they were intended for legitimate end-users. This is true as to virtually all of the seizures made under the EAA. Thus, after the posting of necessary bonds and receipt of a license, these exports are allowed to go.

The investigative arm of the Office of Export Enforcement has also achieved laudable results. As stated by Assistant Attorney General Lowell Jensen, at a March 1, 1983 hearing before two Subcommittees of the House Ways and Means Committee, the Commerce Department had referred 20 Export Administration Act violations to the Department of Justice for criminal prosecution. Since Commerce had only 40 investigators at that time, we are very proud of our effectiveness. Our FY '83 records show that with 66 enforcement personnel assigned, we were successful in referring 25 cases to Justice for criminal prosecution.

Mr. Chairman, the Administration understands the Congressional sentiment to increase attention on the enforcement area. Quite frankly, when the Reagan Administration took office, we were faced with problems in both the U.S. export control and export enforcement functions. The problems were not just confined to

Commerce, however; they were long-standing and pervasive. The GAO's April 1979 report, for example, concluded that the U.S. Customs Service, too, lacked quality investigations in their enforcement of the Munitions List.

When the Reagan Administraton took office we faced a multitude of problems, among them was concern with sensitive technology transfers, an enforcement system weakened by detente, and a backlog of over 2,100 unprocessed export license applications. We could not take protective action with regard to technology transfer until we had accurately assessed the nature of that threat. Therefore, one of the first actions taken by the Administration was to request the intelligence agencies to prepare a comprehensive analysis of Soviet technology acquisition methods. While waiting for these analyses we devoted our limited resources to eliminating the backlog of applications in order to process licenses within the statutory time frames mandated by the EAA.

Not until the Fall of 1981, when we received the analyses on technology transfer did we become fully aware of the magnitude of the problem. These analyses showed that the international scope of technology leakage formed the bulk of the problem. Since there were not sufficient resources to upgrade quickly both our enforcement function and seek to upgrade the multilateral (COCOM) system of export controls, we had to decide which area to work on first. Based on the findings of the intelligence analyses, the decision was made to focus on the larger and more pressing issue of strengthening multilateral controls.

As a result of our efforts a COCOM High Level Meeting, the first in 25 years, was held in January 1982. This meeting, in which Commerce played a key role, resulted in a commitment from our COCOM partners to strengthen international control efforts through harmonization of licensing procedures, increasing multilateral enforcement, and strengthening the COCOM Control List to catch critical technologies and equipment. Since that time we have had another High Level Meeting and many bilateral meetings with COCOM member governments in order to achieve those goals.

The following year we had the resources to upgrade Commerce's enforcement function. Since then we have made considerable progress.

I would like to address some of the concrete steps Commerce has taken. First, substantial budget increases were allocated for our enforcement effort. Commerce's old Compliance Division was abolished and our export enforcement role considerably upgraded by the creation of a separate Office of Export Enforcement, under the guidance of a new Deputy Assistant Secretary, Mr. Theodore W. Wu, formerly with the Justice Department. Mr. Wu is one of this country's foremost prosecutors of export control violations. He was responsible for breaking the Bruchhausen multinational technology transfer conspiracy, a classic diversion case.

Mr. Wu was charged with the responsibility of ensuring that the Department maintain a professional export control enforcement program consistent with the legislative intent of Congress. He has done so. Since Mr. Wu has been on board, he has instituted a sound management program to solve previous enforcement shortcomings. For example:

(1) To further enhance the Office of Export enforcement's intelligence analyses capabilities, we are actively procuring advanced data processing hardware as well as appropriate software for this system.

(2) We have opened up two enforcement field offices in the high tech areas of Los Angeles and San Francisco. The New York enforcement field office and the Washington staff of criminal investigators have been strengthened. We plan to open additional enforcement field offices in other high tech areas in the next twelve months, and to continue expanding our investigative and intelligence manpower.

(3) We have hired more than 40 criminal investigators, intelligence analysts and program professionals. Recruitment of additional criminal investigators and intelligence personnel is continuing.

(4) We have committed $383,000 to provide these agents with modern investigative equipment, including computers, vehicles, and communications systems.

(5) We have increased the Office of Export Enforcement's operational travel allotment, which is essential to successful investigation efforts. We have budgeted over $150,000 for this purpose in this year's travel budget allowance, a considerable increase over past budget allowances.

We are proud to report that our new special agents are highly trained and experienced criminal investigators. In addition, investigators who were with us prior to the reorganization of Commerce's export enforcement arm have successfully completed or are scheduled to complete necessary law enforcement training at the Federal Law Enforcement Training Center. We are also developing our own specialized Operational Readiness Training Program unique to strategic export control enforcement. This program will cover appropriate law enforcement and criminal judicial procedures, and will include strategic export control intelligence processing and application.

These revitalization efforts are far from complete. Nevertheless, our initial steps are producing tangible results. We are conducting investigations of types and magnitudes which could not have been pursued in the past; in fact, our proficiency in intelligence collection and analyses is uncovering in greater frequency, new sophisticated diversion networks such as purchases by front organizations, third country nationals, and outright theft.

Results of Improved Enforcement Performance

The Office of Export Enforcement has participated in over 30 cases which have been referred to the Department of Justice for prosecution. Of these cases, twenty-four were initially referred to Justice by our special agents since July 1982. Our special agents have been requested and are lending assistance to United States Attorneys' offices and to other agencies in national security-sensitive investigations.

In one recent referral to the United States Attorney for the Eastern District of New York our agents prevented the illegal export of over $400,000 of state-of-the-art semiconductor manufacturing equipment and technology. That victory was the culmination of a six-month long investigation.

We initiated several other investigations based on the analysis of licensing information by our intelligence staff working in conjunction with our special agents. In two cases, information obtained from licensing histories of suspect firms was compared to known equipment acquisitions by those same firms. The business records obtained following the execution of search warrants indicated continuing patterns of violations of export controls by the two firms, and possible connections with Soviet Bloc countries.

One of our export enforcement cases recently resulted in the conviction of a West German national who now resides in Virginia and who had been arrested for violating U.S. export controls; another case in New York resulted in the arrest and indictment of the violator.

I am pleased to note, Mr. Chairman, that S.979 includes a provision establishing new statutory crimes for conspiring to and attempting to violate the Export Administration Act, as well as a new criminal forfeiture provision. The addition of the latter provision will equip prosecutors with a valuable tool to reach the proceeds of illegal transactions. The Administration bill also contains similar provisions.

In conclusion, Mr. Chairman, stemming the flow of sensitive items to our potential adversaries requires the full cooperation of not only U.S. Government agencies, but also of Congress, the business community, and other cooperating governments. Commerce has made great strides in creating an organization to stem this flow. We focus exclusively on strategic export control enforcement. We have a well established relationship with the business community enabling us to raise the public's level of awareness to illegal technology acquisition schemes. We also work closely and cooperatively with other intelligence and enforcement agencies in our export enforcement effort. I ask for your support so that together we can continue to build on the foundation we have already created for effective enforcement of our export controls.

I would be pleased to answer any questions you may have.

STATEMENT OF HON. RICHARD T. McCORMACK, ASSISTANT SECRETARY OF STATE FOR ECONOMIC AND BUSINESS AFFAIRS

Senator Danforth. Mr. McCormack.

Mr. McCormack. Thank you very much.

It is a pleasure to appear before you, Mr. Chairman, and before the Subcommittee for Trade on behalf of the administration.

I wish to address two subjects. First, the Senate proposal of section 6(1) of S. 979 authorizing import controls against countries against which foreign policy export controls have been imposed. And, second, the proposal in section 9(7) of S. 979 authorizing import sanctions against companies violating security controls. The administration has serious reservations concerning both these proposals.

The Senate proposal on import controls against countries provides that whenever the authority conferred by section 6 for foreign policy controls is exercised, the President would be authorized to impose controls against imports from the same country. Neither the existing act nor the administration bill has a comparable provision. The embargoes against imports from Cuba, Vietnam, North Korea, and Kampuchea are based on emergency authority rather than on Export Administration Act authority.

The same Senate bill which would grant broad authority to control imports for foreign policy purposes curtails authority to control exports for foreign policy purposes. We believe this is illogical. This anomaly was specifically noted by a panel of private witnesses who appeared before the Senate Foreign Relations Committee on June 27.

Our main objection to giving the President this authority is that it would create a new avenue for protectionist pressures. The very existence of such authority would be viewed with suspicion as a significant step in the direction of protectionism by our major trading partners, especially in the current environment. Because of the upsurge in economic activity in the United States is occurring ahead of that of its trading partners, the potential for protectionist pressures will be particularly acute in the near future.

Our allies have already voiced their concern that the use of this import authority would violate our international obligations under the General Agreement on Tariffs and Trade, commonly known as the GATT. We will find it very difficult to obtain support for our goal of an expansion of the GATT to services and other areas while our position in support of free and open international trade is being undercut through creation of authority for foreign policy import controls.

The administration's commitment to free trade and our efforts to push for lowering of protectionist barriers in other countries to provide markets for U.S. exports would be hurt by the enactment of this provision. We are, therefore, strongly opposed to the provision and recommend its deletion from the Senate bill.

Let me now turn to the Senate proposal in section 9(7) for import sanctions against companies. That provision provides that anyone who violates any regulation issued pursuant to a multilateral agreement to control exports for national security purposes may be subject to import sanctions. There is no comparable provision in existing legislation. The administration proposal for import sanctions is limited to violations of U.S. security export controls and does not apply, as the Senate bill would, to violations of certain laws and regulations of our allies.

The administration's rationale is straightforward. We wish to have the authority to deny the American market to those companies abroad which reexport U.S. goods and technology in violation of our national security controls. Security controls are an area of general multilaternal consensus among our allies. This reduces the risk that such import sanctions would lead to international political or legal disputes. We have assured our allies that we view our import sanctions proposal purely as an enforcement tool that can support our common efforts in strengthening security controls. Such authority would not be used lightly, but rather after careful weighing of the pros and cons in the context of a particular security violation overseas.

The Senate bill, on the other hand, includes a much broader grant of authority. In essence, the Senate provision would authorize import sanctions against foreign firms not only for violating U.S. laws but also for violations of foreign Cocom related laws and regulations. Consequently, it would reach situations in which the United States would have no basis to claim jurisdiction.

Import sanctions of the type proposed by the Senate bill go beyond any attempt merely to reinforce U.S. security reexport controls. There is also the legitimate question of whether the U.S. Government has legitimate standing to determine when foreign laws have been violated. Because of the ramifications this proposal might have on the international trading system and our economic relations in general, we strongly recommend that the Senate import sanctions provision be scaled back to comport with the administration proposal.

My Chairman, I appreciate the opportunity to appear before you, and I hope that you and the committee will seriously consider amending the Senate bill on import controls, and import sanctions in the ways I have suggested. I feel these changes would best serve our economic interests while still protecting our strategic and foreign policy concerns.

Thank you very much.

Senator **Danforth**. Thank you.

[The prepared statement of Mr. McCormack follows:]

TESTIMONY BEFORE THE SENATE FINANCE COMMITTEE, SUBCOMMITTEE FOR TRADE BY RICHARD T. MCCORMACK, ASSISTANT SECRETARY FOR ECONOMIC AND BUSINESS AFFAIRS

It is a pleasure for me to appear before you, Mr. Chairman, and before the Subcommittee for Trade on behalf of the Administration. I wish to address two subjects: first, the Senate proposal in Sec. 6(1) of S.979 authorizing import controls against countries against which foreign policy export controls have been imposed; and second, the proposal in Section 9(7) of S.979 authorizing import sanctions against companies violating security controls. The Administration has serious reservations concerning both these proposals.

The Senate proposal on import controls against countries provides that whenever the authority conferred by Section 6 for foreign policy controls is exercised, the President would be authorized to impose controls against imports from the same country. Neither the existing Act nor the Administration bill has a comparable provision. The embargoes against imports from Cuba, Vietnam, North Korea, and Kampuchea are based on emergency authority rather than on Export Administration Act authority.

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Our main objection to giving the President this authority is that it would create a new avenue for protectionist pressure. The very existence of such authority would be viewed with suspicion as a significant step in the direction of protectionism by our major trading partners, especially in the current environment. Because of the upsurge in economic activity in the United States is occurring ahead of that of its trading partners, the potential for protectionist pressures will be particularly acute in the near future.

Our allies have already voiced their concern that use of this import authority would violate our international obligations under the General Agreement on Tariffs and Trade commonly known as the GATT. We will find it very difficult to obtain support for our goal of an expansion of the GATT to services and other areas while our position in support of free and open internaitonal trade is being undercut through creation of authority for foreign policy import controls.

The Administration's commitment to free trade and our efforts to push for lowering of protectionist barriers in other countries to provide markets for U.S. exports would be hurt by the enactment of this provision. We are, therefore, strongly opposed to the provision and recommend its deletion from the Senate bill.

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The Administration's rationale is straightforward. We wish to have the authority to deny the American market to those companies abroad which reexport U.S. goods and technology in violation of our national security controls. Security controls are an area of general multilateral consensus among our allies. This reduces the risk that such import sanctions would lead to international political or legal disputes. We have assured our allies that we view our import sanctions proposal purely as an enforcement tool that can support our common efforts in strengthening security controls. Such authority would not be used lightly, but rather after careful weighing of the pros and cons in the context of a particular security violation overseas.

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Import sanctions of the type proposed by the Senate bill go beyond any attempt merely to reinforce U.S. security reexport controls. There is also the legitimate question of whether the USG has legitimate standing to determine when foreign laws have been violated. Because of the ramifications this proposal might have on the international trading system and our economic relations in general, we strongly recommend that the Senate import sanctions provision be scaled back to comport with the Administration proposal.

Mr. Chairman, I appreciate the opportunity to appear before you, and I hope that you and the Committee will seriously consider amending the Senate bill on import controls and import sanctions in the ways I have suggested. I feel these changes would best serve our economic interests while still protecting our strategic and foreign policy concerns. Thank you.

STATEMENT OF HON. JOHN WALKER, ASSISTANT SECRETARY OF THE TREASURY FOR ENFORCEMENT AND OPERATIONS

Senator **Danforth**. Mr. Walker.

Mr. **Walker**. Thank you, Mr. Chairman.

I'm pleased to have the opportunity to appear before you today on behalf of the Treasury Department on the enforcement issues.

S. 979 proposes that the enforcement of the act be transferred to the Customs Service. As Mr. Olmer has stated, the administration has forwarded a bill to Congress that does not propose to change the enforcement responsibilities now shared between Commerce and Customs.

In my testimony today, I would like to concentrate on the enforcement program of the Treasury Department and the U.S. Customs Service against the illegal exportation of critical technology, as this program is now conducted, and under the statutory and administrative authority as it exists today. I would like to describe the measures we have taken, and also mention some of the problems that we have faced.

Operation Exodus is the program under which the Customs Service enforces critical technology export controls. Customs conducts this program under authority delegated by the Secretary of Commerce. The Exodus program also encompasses the enforcement of export controls under the Arms Export Control Act, the authority for which has been delegated to Customs by the State Department. State relies exclusively on Customs for enforcement under this act. Treasury and Customs have combined these two enforcement responsibilities in a single program because they have basic similarities and because Customs' investigations frequently encounter violations of both acts, often by the same individuals.

I know that this committee is concerned about the relationship of the illegal exports of critical technology to our national security. It is sufficient to recount that in the last decade or so, the Soviet Union has pursued every avenue, legal and illegal, open and clandestine, to acquire defense-related technology, principally from the United States. The Soviets and their allies have conducted nothing short of an all-out effort to capture our military secrets, specifically the technological capability to duplicate and to counter our defense hardware. You may recall that the CIA, in an unclassified study, reported in 1981 that the Soviet acquisition program has allowed them to save hundreds of millions of dollars in military research and development costs, as well as years of leadtime. By copying proven Western designs, they have modernized critical sectors of their military without the risks attendant to new and untested engineering. As Defense Secretary Weinberger has pointed out, their acquisitions not only compromise our national security, while comprising a theft of U.S. research and development, they also cost U.S. taxpayers billions of dollars by necessitating the development of new generations of weapons systems.

Until 1981, when this administration turned its attention to the problem of transfer of defense-related technology, enforcement of controls on critical technology exports had been practically ignored. It was clear that we could no longer afford to sit by while the Soviets continued to erode the technological edge on which our national security is based. At the same time, we recognized that we had an obligation to U.S. industries to minimize any interference with legitimate commerce that might result from our enforcement program. When Operation Exodus began, a significant problem was that great numbers of shipments were in unintentional violation of the act's requirements. Because these requirements had never before been effectively enforced, the transition occurred amidst some misunderstanding, and some criticism, on the part of the export community. To remedy this situation, we have made special efforts to get our message across to U.S. exporters, and we believe that we have largely succeeded. Exporters who fully intend to comply with the law are now well informed, and the knowledge that Operation Exodus has a presence at U.S. ports is a deterrent to those exporters who would directly attempt to violate our export laws. This effort to communicate our intentions and to establish our inspectional presence at U.S. ports constituted phase I of our overall Exodus strategy.

While we are continuing to refine our inspection process, we have now moved into phase II and phase III of our Exodus strategy. In phase II, we have given increased attention to building criminal cases against organized and systematic violators of our export controls, both in the United States and abroad. In phase III, we have made it a priority to support the enforcement of the national security-based export controls of our allies. We realize that ultimately we cannot succeed if the technology that we are striving to control is easily available in the markets of other Western nations.

Operation Exodus has expanded its enforcement presence since its inception in 1981. It is staffed with 292 full-time Customs personnel and operates out of 43 locations, but it also draws on the resources and expertise of Customs' entire inspectional and investigative force. As Exodus has developed since its inception in October 1981, it has been increasingly successful. Seizures in fiscal year 1983 are outpacing those in fiscal year 1982, and their dollar value, which was already in the millions, has increased substantially. I want to emphasize that as large as the dollar value of these seizures may be, the potential military value to the Soviets would have been far greater.

Perhaps even more significant than our actual seizures has been the greater awareness we have gained of the means by which the Soviet Union and the Warsaw Pact nations seek to acquire our military secrets. Our investigations have uncovered networks of dummy corporations in the United States that serve as middlemen in complex international transactions. Such transactions are designed to disguise the identity and destination of shipments and almost always involve diversion through other Western nations. Our enforcement experience has heightened our awareness of the importance of our overseas investigative role and has caused us to embark on an effort to enhance the U.S. Customs enforcement presence in foreign countries. We now have 21 special agents and 16 support staff located in foreign cities, and we are in the process of deploying 18 additional special agents and 6 additional staff persons to investigate violations of the Export Administration Act, and its related criminal statute, the Arms Export Control Act.

Mr. Chairman, I am sure that this committee is aware that the progress we have made in technology enforcement through Operation Exodus has not been achieved without some controversy and criticism. Some of our critics have charged that our program is an unwarranted infringement on trade and interferes with legitimate business interests. Others have stated that Exodus has resulted in needless detentions of shipments. At this time, I would like to respond to each of these contentions.

With regard to interference with trade and the legitimate rights of exporters, we must recognize that as much as we would like to, it is not possible to administer a program to enforce export control laws without causing some inconvenience for the exporting community. Just as Customs' responsibility to collect tariffs and to keep illegal goods out of our country must, of necessity, affect importers, the export control laws will cause some delays in the exportation process. As is consistent with our Government's commitment to facilitate U.S. exports, we have sought to minimize the inconvenience of our enforcement effort on the export community.

In addition, it is fair to say that the extent of interference with trade has been overstated. Though delays in obtaining clearances for shipments have occurred, only a minute percentage of shipments has been involved. In fiscal year 1982, the Customs Service supervised 9.9 million export shipments. Of these, only 2,481, or less than three-hundredths of 1 percent, were detained for the purpose of enforcement of export controls. Of these 2,481 detentions, 765, or 30.8 percent, resulted in actual seizures for violation of export laws.

Additionally, the period of time consumed by any Customs detention is very brief. In every case in which a shipment is detained for any reason related to licensing for export control purposes, Customs refers the matter to the Department of Commerce within 24 hours of the detention itself. Similarly, once Commerce has made its determination on a shipment, that determination is communicated through Customs headquarters to the field within 24 hours.

Additionally, in phase II and phase III we have been able to target our inspections to specific types of shipments, and thus further minimize disruption while we increase our overall effectiveness. To illustrate the success of this approach, it is helpful to examine some of the technology transfer cases that have international dimensions.

The *Bruchhausen* case, for example, resulted in the disruption of the operations of international coconspirators who had made over 8 million dollars' worth of illegal technology shipments to the Soviet Union. The diversions were effected through dummy corporations in California and West Germany that functioned as intermediaries in supplying particular equipment sought by Soviet officials. During the investigation, Customs and Commerce prevented the diversion of a strategic plotting device and equipment used to manufacture silicon chips.

In the *Land Resources Management* case, Customs was able to prevent the illegal shipment of a computerized, state-of-the-art, airborne land-scanning system by tracing the intended course of the shipment through Mexico, Switzerland, and on to the Soviet Union. This system, in itself, would have compromised our security if it had fallen into the hands of the Soviets.

In the *Verner Hilpert* case, Customs arrested Hilpert, an employee of the Volker-Nast Co. of West Germany, as he attempted to board a plane leaving the United States. Customs agents seized the package he was carrying, which contained a sophisticated microwave surveillance receiver that Volker-Nast had sought to obtain for purposes of diversion to the Soviets.

All of these cases demonstrate that overseas investigations and high quality intelligence are crucial to our success in enforcing export controls. They also demonstrate the effectiveness of the Treasury program in carrying out its delegated authority under the Export Administration Act.

Mr. Chairman, I would now like to respond to your request for testimony on the matter of Exodus resources in light of proposed cutbacks in Customs' staffing. I can assure this committee that the recommended cut in Customs' personnel applies to nonenforcement efforts. I would also emphasize that in no way will an enhancement of Exodus enforcement come at the expense of resources for Customs' commercial operations. Treasury recognizes that adequate staffing for the commercial functions of the Customs Service is essential to our Nation's trade.

Mr. Chairman, this concludes my testimony today. And I would be pleased to answer any questions.

Senator DANFORTH. Thank you.

[The prepared statement of Mr. Walker follows:]

TESTIMONY OF THE HONORABLE JOHN M. WALKER, JR., ASSISTANT SECRETARY (ENFORCEMENT & OPERATIONS) BEFORE THE COMMITTEE ON FINANCE SUBCOMMITTEE ON INTERNATIONAL TRADE UNITED STATES SENATE ON THE SUBJECT OF ENFORCEMENT OF THE EXPORT ADMINISTRATION ACT

AUGUST 4, 1983

Mr. Chairman and Members of the Subcommittee:

I am pleased to have the opportunity to appear before you today on the enforcement of the Export Administration Act.

S. 979 proposes that the enforcement of the Act be transferred to the Customs Service. As Mr. Olmer has stated, the Administration has forwarded a bill to Congress that does not propose to change the enforcement responsibilities now shared between Commerce and Customs.

In my testimony today, I will concentrate on the enforcement program of the Treasury Department and the U.S. Customs Service against the illegal exportation of critical technology, as this program is now conducted, and under the statutory and administrative authority as it exists today. I will describe the measures we have taken, and also mention some of the problems we have faced.

Operation Exodus is the program under which the Customs Service enforces critical technology export controls. Customs conducts this program under authority delegated by the Secretary of Commerce. The Exodus program also encompasses the enforcement of export controls under the Arms Export Control Act, the authority for which has been delegated to Customs by the State Department. State relies exclusively on Customs for enforcement under this Act. Treasury and Customs have combined these two enforcement responsibilities in a single program because they have basic similarities and because Customs' investigations frequently encounter violations of both Acts, often by the same individuals.

I know that this Committee is concerned about the relationship of the illegal exports of critical technology to our national security. It is sufficient to recount that in the last decade or so, the Soviet Union has pursued every avenue, legal and illegal, open and clandestine, to acquire defense-related technology, principally from the United States. The Soviets and their allies have conducted nothing short of an all-out effort to capture our military secrets, specifically the technological capability to duplicate and to counter our defense hardware. You may recall that the CIA, in an unclassified study, reported in 1981 that the Soviet acquisition program has allowed them to save hundreds of millions of dollars in military research and development costs, as well as years of lead time. By copying proven Western designs, they have modernized critical sectors of their military without the risks attendant to new and untested engineering. As Defense Secretary Weinberger has pointed out, their acquisitions not only compromise our national security, while comprising a theft of United States research and development, they also cost U.S. taxpayers billions of dollars by necessitating the development of new generations of weapons systems.

Until 1981, when this Administration turned its attention to the problem of transfer of defense-related technology, enforcement of controls on critical technology exports had been practically ignored. It was clear that we could no longer afford to sit by while the Soviets continued to erode the technological edge on which our national security is based. At the same time, we recognized that we had an obligation to U.S. industries to minimize any interference with legitimate commerce that might result from our enforcement program. When Operation Exodus began, a significant problem was that great numbers of shipments were in unintentional violation of the Act's requirements. Because these requirements had never before been effectively enforced, the transition occurred amidst some misunderstanding, and some criticism, on the part of the export community. To remedy this situation, we have made special efforts to get our message across to U.S. exporters, and we believe that we have largely succeeded. Exporters who fully intend to comply with the law are now well informed, and the knowledge that Operation Exodus has a presence at U.S. ports is a deterrent to those exporters who would directly attempt to violate our export laws. This effort to communicate our intentions and to establish our inspectional presence at U.S. ports constituted Phase I of our overall Exodus strategy.

While we are continuing to refine our inspection process, we have now moved into Phase II and Phase III of our Exodus strategy. In Phase II, we have given increased attention to building criminal cases against organized and systematic violators of our export controls, both in the United States and abroad. In Phase III, we have made it a priority to support the enforcement of the national-security-based export controls of our allies. We realize that ultimately we cannot succeed if the technology that we are striving to control is easily available in the markets of other Western nations.

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Perhaps even more significant than our actual seizures has been the greater awareness we have gained of the means by which the Soviet Union and the Warsaw-pact nations seek to acquire our military secrets. Our investigations have uncovered networks of dummy corporations in the United States that serve as middlemen in complex international transactions. Such transactions are designed to disguise the identity and destination of shipments and almost always involve diversion through other Western nations. Our enforcement experience has heightened our awareness of the importance of our overseas investigative role and has caused us to embark on an effort to enhance the U.S. Customs enforcement presence in foreign countries. We now have 21 Special Agents and 16 support staff located in foreign cities, and we are in the process of deploying 18 additional Special Agents and 6 additional staff persons to investigate violations of the Export Administration Act and its related criminal statute, the Arms Export Control Act.

Mr. Chairman, I am sure that this Committee is aware that the progress we have made in technology enforcement through Operation Exodus has not been achieved without some controversy and criticism. Some of our critics have charged that our program is an unwarranted infringement on trade and interferes with legitimate business interests. Others have stated that Exodus has resulted in needless detentions of shipments. At this time, I would like to respond to each of these contentions.

With regard to interference with trade and the legitimate rights of exporters, we must recognize that as much as we would like to, it is not possible to administer a program to enforce export control laws without causing some inconvenience for the exporting community. Just as Customs' responsibility to collect tariffs and to keep illegal goods out of our country must, of necessity, affect importers, the export control laws will cause some delays in the exportation process. As is consistent with our Government's commitment to facilitate U.S. exports, we have sought to minimize the inconvenience of our enforcement effort on the export community.

In addition, it is fair to say that the extent of interference with trade has been overstated. Though delays in obtaining clearances for shipments have occurred, only a minute percentage of shipments has been involved. In Fiscal Year 1982, the Customs Service supervised 9.9 million export shipments. Of these, only 2,481, or less than three hundredths of one percent, were detained for the purpose of enforcement of export controls. Of these 2,481 detentions, 765, or 30.8 percent, resulted in actual seizures for violation of export laws.

Additionally, the period of time consumed by any Customs detention is very brief. In every case in which a shipment is detained for any reason related to licensing for export control purposes, Customs refers the matter to the Department of Commerce within twenty-four hours of the detention itself. Similarly, once Commerce has made its determination on a shipment, that determination is communicated through Customs headquarters to the field within 24 hours.

Additionally, in Phase II and Phase III we have been able to target our inspections to specific types of shipments, and thus further minimize disruption while we increase our overall effectiveness. To illustrate the success of this approach, it is helpful to examine some of the technology transfer cases that have international dimensions.

The Bruchhausen case, for example, resulted in the disruption of the operations of international co-conspirators who had made over $8 million worth of illegal technology shipments to the Soviet Union. The diversions were effected through dummy corporations in California and West Germany that functioned as intermediaries in supplying particular equipment sought by Soviet officials. During the investigation, Customs and Commerce prevented the diversion of a strategic plotting device and equipment used to manufacture silicon chips.

In the Land Resources Management case, Customs was able to prevent the illegal shipment of a computerized, state-of-the-art airborne land scanning system by tracing the intended course of the shipment through Mexico, Switzerland and on to the Soviet Union. This system, in itself, would have compromised our security if it had fallen into the hands of the Soviets.

In the Verner Hilpert case, Customs arrested Hilpert, an employee of the Volker-Nast Co. of West Germany, as he attempted to board a plane leaving the United States. Customs agents seized the package he was carrying, which contained a sophisticated microwave surveillance receiver that Volker-Nast had sought to obtain for purposes of diversion to the Soviets.

All of these cases demonstrate that overseas investigations and high quality intelligence are crucial to our success in enforcing export controls. They also demonstrate the effectiveness of the Treasury program in carrying out its delegated authority under the Export Administration Act.

Mr. Chairman, I would now like to respond to your request for testimony on the matter of Exodus resources in light of proposed cutbacks in Customs staffing. I can assure this Committee that the recommended cut in Customs personnel applies to non-enforcement efforts. I would also emphasize that in no way will an enhancement of Exodus enforcement come at the expense of resources for Customs' commercial operations. Treasury recognizes that adequate staffing for the commercial functions of the Customs Service is essential to our nation's trade.

Mr. Chairman, this concludes my testimony today. I would be pleased to answer any questions that the Committee may have.

Senator **Danforth**. Senator Dole.

Senator **Dole**. Thank you, Mr. Chairman. I need to go to the Senate floor to see if we can bail out a farm bill. Probably not. But it's one last shot.

And I just wanted to make a brief comment. Senator Long and I have asked for this opportunity to consider S. 979 because several amendments to that bill fall within the jurisdiction of the Committee on Finance. We are concerned about the integrity of the committee, and this bill raises important questions which this subcommittee is especially competent to evaluate. We certainly want to cooperate with the Banking Committee to avoid any unnecessary delay in Senate consideration of the bill, and still carry out this committee's wishes.

I would just say generally the use of export controls by the executive branch to carry out U.S. foreign policy and to protect its national security may be an attractive alternative to more dramatic and costly measures, such as the use of armed force. And I certainly support the President's efforts to control exports which contribute to our military adversaries. However, we've had some unfortunate impacts with export controls, particularly, in the agricultural area. The use of export controls to carry out U.S. foreign policy sometimes involving pure symbolism, is particularly painful in an era when the U.S. deficit and its balance of trade is growing to unprecedented proportions. The United States needs to protect its reputation as a reliable supplier.

Mr. Chairman, I'm concerned that we consider carefully the implications of expanding the President's arsenal of export controls by adding the authority to impose import controls. Use of this authority could justify retaliation against U.S. exports, particularly, of agricultural commodities. I've got a feeling that the agricultural community hasn't awakened yet to the threat that they are about to be saddled with. I'm glad to see that we will have a witness from the agricultural community, Mr. Steinwig, senior vice president of Continental Grain Co., appearing as Chairman of the International Trade Committee, National Grain and Feed Association.

So I just suggest this is a matter that should be addressed carefully, and one that I hope this committee will act on without holding up the efforts of the banking committee. I don't suggest we delay the bill, but at least we ought to be alert to what is happening, and alert those constituencies who may not know what is happening.

The question for us today is not whether this or any other President uses export controls wisely or even whether he ought to have the authority to impose export controls. But rather we must consider whether it's appropriate as a part of his export control authority to grant the President unprecedented and unfettered discretion to use import controls. Over the years, Congress, and this committee in particular, have labored over laws which define the circumstances under which the President may impose import controls. These trade laws contain some of the most complex procedural requirements present in any laws. This elaborate framework reflects the concensus reached over many, many years between the executive and the Congress that to limitation of U.S. imports should be authorized in circumstances where such limitations do not invite damaging retaliation against our exports.

So it would seem to me that we have an area of disagreement in S. 979 that's rather a sharp departure. There may be good reason for it. I think we just have to evaluate whether this added import authority would make the use of export controls more attractive and, therefore, more likely. If we are going to enhance our reputation as a reliable supplier, we must ensure that export controls are used sparingly and only where they are effective in accomplishing important and tangible national goals. And I think in evaluating whether or not this import authority is going to be of any value, we must also take a look at the threat this is going to pose to American exporters.

It was certainly never our intention to delay consideration of the bill. I know Senator Heinz and others would have liked to have had the bill up before the recess. I think the integrity of our committee—and I have heard that word used today—is at stake.

Senator DANFORTH. Thank you, Senator Dole.

I am looking through the list of economic sanctions imposed by the United States for foreign policy reasons, and it would appear that the use of trade as a foreign policy weapon is accelerating in geometric proportions. Between 1940 and 1965, 25 years, trade sanctions were used 18 times. So that was 18 times in 25 years. Then between 1965 and 1977, 12 years, they were also used 18 times. And then between 1977 and 1983, 6 years, 18 times. So it is literally a geometric increase in the use of trade sanctions for foreign policy reasons.

One would think that this increased use of this tool of foreign policy would indicate that it is the conclusion of various administrations that it works. Do you believe that trade sanctions work? Or is it just a symbolic statement by the United States that we don't approve of another country?

Mr. OLMER. Mr. Chairman, I would certainly hope that Assistant Secretary McCormack on behalf of the State Department wants to offer an opinion on that regard, but I would be pleased to provide you with an opinion. On occasion it is exactly as you say—a symbol. No one in his right mind believes that the anti-boycott provisions of the Export Administration Act are likely to change our behavior. And no one that I am familiar with has suggested that that part of the act be repealed.

Moreover, our human rights controls that have been extended to among other nations—South Africa for its essentially apartheid policy is, I think, applied in recognition of the heinous nature of that conduct, and not because we believe there's a relationship between the export controls on, for example, toothbrushes to the police and military, and the likelihood of change of national policy by the central government. But we do it, and we haven't asked for it to be changed.

In other areas it is arguable as to whether or not there has been some success. I was interviewed this last week by Cable News Network on a question of whether the foreign policy controls against the Soviet pipeline were successful. The Soviets went to some length to provide an opportunity for a CNN journalist to tour the

Soviet Union, and to demonstrate how these controls were not effective.

Well, it was a disinformation piece as far as I am concerned because there is substantial evidence on the record that those controls did achieve certain kinds of objectives.

So the question that you have posed is an enormously complicated one. I would say that foreign policy export controls have limited purposes; they are never intended to be all-encompassing or to provide a panacea for the full range of the problems which we confront, but that they are useful.

Senator **Danforth**. Well, I don't think anybody is suggesting that they be repealed. Obviously, they are going to be used. They are a way of making a statement. And the United States is going to continue to make statements for foreign policy reasons.

I think the issue is the extent to which they are used. It is clear that with the question of the grain embargo the United States caused itself tremendous harm. My concern is that if we extend this to include import controls as well as exports controls, there are going to be enormous new constituencies in the United States for the use of the Export Administration Act. And people are going to be clammering before the administration to impose export controls.

So I don't say wipe out any export controls. I think the question is whether they are used in a limited fashion or whether they are used in virtually unlimited fashion. And it would seem to me that if we joined them with import controls we are going to see this geometric trend accelerate.

Mr. **Olmer**. Perhaps, Mr. Chairman—not perhaps. It is self-serving to point to the more limited form of import controls which the administration has requested. It's limited to the extent that it would apply only to national security issues, and then only to where we find a foreign company violative of a U.S. national security export control regulation. Then and only then would we want the authority to prevent that company from exporting to the United States.

There are two conditions. One, where we clearly have, not arguably, but clearly have jurisdiction. That is to say violation of a U.S. law. And, second, where national security is involved.

Senator **Danforth**. Senator Heinz.

Senator **Heinz**. Thank you, Mr. Chairman. Mr. Chairman, I have an opening statement that I would like to include in the record at the appropriate point.

And as part of that opening statement, I would like to also include a letter from Chairman Garn and Senator Proxmire to Chairman Dole pointing out the rather, at least in their judgment, tenuous jurisdictional claim made at this point in time to these issues. I don't want to debate that here. May we have your assurance that will be put in the record?

Senator **Danforth**. Yes.

The letter from Senators Jake Garn and William Proxmire of the Committee on Banking, Housing, and Urban Affairs follows:]

UNITED STATES SENATE,
COMMITTEE ON BANKING, HOUSING, AND URBAN AFFAIRS,
Washington, D.C., August 1, 1983.

Hon. *Robert Dole,*
Chairman, Committee on Finance,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: Thank you for your letter of July 15, 1983, expressing your concern that certain provisions of S. 979, as reported by the Committee on Banking, Housing, and Urban Affairs, deal with matters that lie within the jurisdiction of the Committee on Finance.

With regard to the items that you cited in your letter, and over which you assert jurisdiction, I would point out that those provisions do not exist in isolation but rather are integral parts of the bill S. 979 and were so included by the entire Banking Committee, several members of which are also members of your Committee. S. 979 would amend and renew the Export Administration Act of 1979, and thus is a bill the predominant subject matter of which is squarely within the jurisdiction of the Committee on Banking, Housing, and Urban Affairs, as described in Rule XXV of the Standing Rules of the Senate.

This view is reflected in the decision of the presiding officer to refer to the Banking Committee bills that contained the very provisions that you cite in your letter. On February 2, 1983, Senator Heinz introduced S. 397, which contained provisions similar to all of the items that you identified in your letter. That bill was referred to the Banking Committee. Also on February 2, 1983, Senators Nunn and Chiles introduced S. 407, which contained a provision similar to item 3 in your letter. That bill was also referred to the Banking Committee. And on April 6, 1983, Senator Heinz, by request, introduced the Administration's bill to amend and renew the Export Administration Act of 1979, S. 979. That bill, as introduced, contained a provision similar to item 2 in your letter, and was also referred to the Banking Committee.

As you are aware, through recent reforms in its rules the Senate has sought to discourage the joint and sequential referral of items of legislation, which practice had gotten out of hand in the past and seriously retarded the work of the Senate. In this regard, I would specifically refer you to Rule XVII of the Standing Rules of the Senate, which states that "in any case in which a controversy arises as to the jurisdiction of any committee with respect to any proposed legislation, the question of jurisdiction shall be decided by the presiding officer, without debate, in favor of the committee which has jurisdiction over the subject matter which predominates in such proposed legislation . . ."

We recognize your concerns about jurisdiction, but we would emphasize the importance of Rule XVII, which we believe should be followed in this case, particularly in view of the need for expediency at this late date. We would be glad, however, to benefit from the expertise of yourself and other members of your Committee, and would have been ready to give close consideration to your concerns, especially if we had been notified of them earlier in the process of drafting our legislation. We will be glad, however, to give you or other members of your Committee the opportunity to propose amendments to the bill when it is considered on the floor. In this regard, we would only draw to your attention the need to consider the bill expeditiously in order to avoid any lapse in the authority provided in the bill. Such a lapse would gravely endanger our national security, foreign policy, and economic policy interests.

We remain ready, within these constraints, to consider any concerns that you might have over these matters.

Sincerely,

JAKE GARN,
Chairman.
WILLIAM PROXMIRE,
Ranking Minority Member.

SENATOR HEINZ. Mr. Chairman, first I just need to make one or two points that may be of value to this committee because I am privileged to serve on both the Banking and Finance Committees, and it's difficult for anybody not on the principal committee of jurisdiction to understand the legislative process contained in other committees.

Suffice it to say that there are almost as many views on what the Export Administration Act ought to do or ought not to do as there are members on the Banking Committee. And there were a variety of balances, tradeoffs, that the members of the committee in their best judgment felt they had to make to get a responsible work product. It is very easy to put any one of those provisions under a microscope, blow it up, and take it out of context. It is an organic bill.

And I fear that the attention to the two import control issues and the enforcement shift from Commerce to Customs is, indeed, having that unfortunate effect, and could cause some real problems if those provisions, for some reason, were to be removed from the bill. I don't think anybody wants to see the Export Administration Act expire on September 30, and for there to be no export controls. But I must tell my friends a view of this chairman of the committee, Senator Garn—and it is my own view as well—is that if we can't get this through it is highly likely that the act will expire.

Now I would like to pursue the issue of national security export controls, the section that we were discussing.

Lionel Olmer has said quite accurately that the administration wants import controls of a carefully defined nature there. That is the administration's position. So the question is not whether import controls are good or bad. The question is how much.

And let me remind Secretary Olmer the reason we have taken the extra step to permit the application of export controls in the case of companies that are in violation of Cocom agreed upon rules is that the only way we felt we could justify liberalizing trade with our Cocom allies, given the leakiness of some of their controls, was to have a strong sanction that would operate for us and tighten their controls.

If we don't have that, things like the Comprehensive Operations License will be objected to by the majority, as far as I can tell—maybe not me, but the majority of Senators on the Banking Committee. And probably a majority of Senators on some other committees, such as the Government Operations Committee. And if we untie that knot, I don't know how we are going to get any liberalization of West-West trade. We are supposed to be for liberalization of West-West trade. So the argument is, this is going to cause trade problems, and this is going to cause more protectionism somehow, is misplaced, since the objective of having this provision, the National Securities Provision, is, indeed, to the contrary to encourage freer trade between Cocom nations.

I have a question in that regard for Lionel Olmer. In our subcommittee hearings where we discussed the provisions at some length; in particular, on March 2—this is before the administration had a bill—I asked you the following question: "Would it be useful to have the power to deny exports to the United States for any company found to be violating either Cocom or U.S. reexport licensing strictures?"

Your reply was, admittedly before the administration had finally made up its mind: "I think that could be a very useful instrument."

Now I know what your position is today. But I would like to know what made you think back in March that this was a "very useful instrument."

Mr. **Olmer**. Well, I would like to say the process of maturation. But I'd say I've spent a good deal of time talking to the most ambitious and inventive Washington lawyers and can find none among them that would make so bold as to suggest there is a basis for asserting in the law control over a violator of a regulation which is not a U.S. law.

Senator **Heinz**. How would you propose to give the kinds of guarantees that many Members of the Senate want if there is going to be a liberalization of West-West exchange through devices such as the Comprehensive Operations License? You favor the COL?

Mr. OLMER. I personally have favored it. I've had some difficulty convincing my colleagues in the Pentagon that it is a desirable procedure. And there has been no, as yet, agreed-upon position in the administration as to how a COL would operate. We have, as you may know, offered to the business community and within the Government a look at a suggested procedure for a Comprehensive Operations License. And I must say that I am on the one hand disappointed at the business community's own lack of enthusiasm in some respects for it, and very disappointed at the lack of enthusiasm in certain parts of the administration.

Senator HEINZ. What I am talking about also holds true, I think, for the general license, for the non-MCTL exports to Cocom. These tend to get put together.

But my question is what—how would you satisfy the concerns of Senator Nunn, Senator Garn, and others who have some very real questions here about any freer West-West trade?

Mr. OLMER. I have no basis for believing that inclusion of such a provision on the import control side would in any way be adequate to satisfy, for example, certain of those in the Defense Department that believe that the COL, as it is presently constituted, is a safe procedure to implement. I don't think that they view it as a tradeoff. And, therefore, I don't think it should be viewed by the committee as a tradeoff.

Senator HEINZ. Let me turn now to the foreign policy controls. I listened with great interest to my colleague from Missouri, Senator Danforth, explain how foreign policy controls have mushroomed and grown geometrically. And I thought that was quite interesting because in foreign policy controls, the principal beneficiaries of our sending unilateral messages are all the other people who don't send the messages like the French and the Japanese and the Germans, and all our export competitors. The principal people who pay the price are American firms and American exporters who have no particular reason to be set upon by their Government, but they are. And the irony of Senator Danforth's comment to me was that the reason the committee chose to have some import control authority, which we hope would always be exercised with constraint, was quite to the contrary of Senator Danforth's conclusion to build a great constituency for export controls. To the contrary, our objective was to make it more difficult to impose export controls. Under current law we don't happen to take other kinds of foreign policy considerations or whether our allies are going along with them into consideration. So the intent of the Banking Committee was, indeed, to try to make the process of imposing controls a little more thoughtful, maybe a little more difficult, particularly in view of the kinds of things that have gone on. It seems so easy to just impose them on our guys when you don't have to take into consideration anything else that is going on in the rest of the world.

So I would just say to my friend Jack Danforth that I find his interpretation unique, even novel, because the intent of our committee was quite the contrary.

Senator DANFORTH. Can I ask the witnesses if they agree with you? [Laughter.]

Senator HEINZ. Well, not this group of witnesses. [Laughter.]

I think I would know where they stand. But I don't give up on you.

Mr. Chairman, I have more questions but Senator Symms is here, and I would like to reserve my questions. I may even have to briefly go up to the Energy Committee.

Senator Danforth. Senator Symms.

Senator Symms. Senator, I hope—can cast a bill for hunting in Alaska for my colleague. He didn't hear me, I can see.

But, Mr. Chairman, I just want to ask first if the hearing record is still open for the first part of our meeting today where we had a hearing on the general system of preferences. I would like to ask unanimous consent to put a statement in the record at the appropriate place.

And I understand—if I understand correctly, I just had one question I wanted to ask Mr. Walker. And it may be that it's out of your jurisdiction. But with respect to the enforcement arm of the export control as a sideline enforcement, do you have anything to do with the problem where some of our trading partners who are our very best allies, as a matter of fact, seem to be having an internal problem of disrespecting our patent laws and creating—where they counterfeit our products. Does that come under your jurisdiction?

Mr. Walker. Yes.

Senator Symms. I don't know whether it's appropriate to ask that as this is really dealing with the general system of preferences that I'm referring to.

Mr. Walker. Well, we do have a major problem, Senator, of counterfeit goods being produced abroad; particularly, to defeat the quota system that we have in this country. For instance, we might have a particular quota with a particular Far Eastern country, which is filled. And that country continues to want to import or companies in that country want to continue to want to import into the United States. They defeat the quota by, in effect, counterfeiting their goods as having been produced in another country. So that is a constant problem that we face.

And we have at the Customs Service an investigative program designed to meet that problem.

Senator Symms. Well, how about in the case where they actually counterfeit a product that was manufactured here, and at the same time they deny a U.S. company access to that market?

Mr. Walker. I think that the problem that you are referring to is the so-called gray market problem that is resulting from copyrights and trademarks which are being used abroad as well as domestically from a parent corporation. And you will end up with goods that are subject to the trademark and copyright coming in from abroad, but being manufactured much more cheaply abroad because of the strength of the dollar. And the question there is should we be enforcing against the importation of those goods. And that is an issue that is currently pending in the Treasury Department for consideration. There is a statute right now on the books that would require enforcement against so-called invasion of goods under the same trademark.

But it runs counter to a Customs' practice that has been in effect for some 61 years. And we are in the process of soliciting comments on this particular issue at the present time. We would be happy to receive any suggestions or comments that you or any of your constituency might have on that question.

Senator Symms. Thank you.

Thank you, Mr. Chairman. That's the only question I had.

Senator **Danforth**. Thank you, Senator Symms.

Let me ask you gentlemen if you would comment on the points that Senator Heinz and I have made. Do you think that the extension of this bill to include import controls as well as export controls would make it more or less likely for our Government to use this procedure? Do you think that it would provide an incentive or do you think, as Senator Heinz argued, that it would provide a disincentive?

Mr. **McCormack**. I would just say in general that would depend on a case-by-case analysis. And you can't make really a general statement on that. At least I don't feel comfortable. But I would be happy to defer to Lionel.

Senator **Danforth**. It seems to me to be absolutely clear, but——

Senator **Heinz**. Not if the chairman is wrong. We realize that might be an unlikely occurrence, but this would be a very good time for it to happen.

Senator **Danforth**. Secretary Olmer.

Mr. **Olmer**. Well, at the risk of being quoted 3 months hence as having committed myself to a position, I think that clearly it would be an ad hoc determination. I think our Cocom partners would simply be infuriated at the suggestion of a foreign government leaping in to penalize violations of their domestic laws. I think we would be, and should be. And that it would not act as an inducement to do better.

We have no lack of political level commitment within the Cocom organization to enforce Cocom regulations.

Senator **Danforth**. Let me clarify the question. I'm referring to section 6 of the bill, which amends section 6 of the Export Administration Act to authorize the President to impose import controls against a country with respect to which he has exercised his power to impose foreign policy export controls.

Mr. **Olmer**. Well, with respect to the same trading partners we have that Senator Heinz has pointed out seem often to be the beneficiary of our foreign policy controls, I don't think it would make any difference to them. They would probably view it as another indication of the United States cutting its own throat.

And with respect to that individual country against which the foreign policy control was applied, that is to say the export control and then an import control, I do not believe it would be an added inducement to do what we felt was desirable.

Senator **Danforth**. Let me again restate the question. The various administrations have used trade sanctions as an instrument of foreign policy at an accelerating rate. It has become more and more frequent as the years have gone on since 1940. The question is: If the President has the authority to impose not only export sanctions but also import sanctions, would the existence of possible import sanctions create a constituency or a series of constituencies in the American public for the use of Export Administration Act? Would it tend to provide more pressure on the administration to utilize the Export Administration Act?

Mr. **Olmer**. I can think of some areas in which it might very well do just that.

Senator **Danforth**. Yes, sir.

Mr. **McCormack**. I would like to invite Grant Aldonas who is the State Department's legal expert and who has spent 4 months working on this particular issue to comment, and to respond to your question.

Senator Danforth. All right.

Mr. Aldonas. I'm not sure I'm an expert. That means I'm a has-been already.

I think I would pick up on Senator Heinz' comment. And I think we have seen, up to this point, abuses of the petitioning process under State legislature that the United States has enacted. And you can certainly envision situations where significant pressures would develop to use that type of thing. The use of export controls at this point has been narrowed to certain specific provisions, and yet there are provisions, such as crime control equipment, that can apply to most countries in the world.

The possibility exists, at least under the present provision, S. 979, to apply import controls to those countries as well. I think our major problem from the Department of State's perspective is that again in context of our trying to gain entrance to services under the GATT agreements. We are constantly in contact with our friends in the EC over different trade disputes. This is something that could be seen as a rejection of what was clearly agreed to at the Williamsburg Summit in terms of trying to reduce trade barriers rather than open up new possibilities to raise trade barriers.

Senator Danforth. Would you like to respond, Mr. Olmer?

Mr. Olmer. Well, I don't believe so much——

Senator Danforth. Mr. Walker?

Mr. Walker. I really have nothing specific to add to the comments that have been made.

Senator Danforth. Mr. Olmer?

Mr. Olmer. I don't believe so much that our trade laws have been abused by the American businessmen. I think more often than not the American businessmen have not had an adequate forum in which to present legitimate complaints, and laws which will rectify injury which has occurred.

But to the direct point, it does seem to me we are not likely to minimize the inducement to use foreign policy controls by this particular provision.

Senator Danforth. That is double negative.

Mr. Olmer. Please don't tell Secretary Baldrige. [Laughter.]

Senator Danforth. Senator Heinz.

Senator Heinz. Secretary Olmer, you are the point man of this bill. We don't envy you. It's a tough area; particularly, when we have court reporters taking down what you said on previous occasions. I apologize for their accuracies.

Mr. Olmer. Court reporters.

Senator Heinz. Clerks. Reporters. Could you explain when it comes to the effectiveness and fairness of foreign policy controls why, it is really fair to place controls on U.S. exporters who might be exporting to a country, and that's supposed to send some kind of message to that country—but continue, at the same time, to import the product from the country to which we are—let's say Iran—trying to send some kind of a message. I mean why is that a balanced, fair, and effective method of signaling foreign policy disagreements?

Mr. Olmer. Well, it may not be. The objective, I hope, would be very sharply—that is narrowly defined. And it would not be desirable to shut down all trade. It would be preferable in my mind to, in the course of sending signals—and, again, I beg Dick McCormack's indulgence—to limit that signal to the most narrow, useful form as in the case of the recently concluded pipeline incident. It was not deemed desirable to extend it to all trade with the Soviet Union, but to specific products—and certainly technologies—which would have the greatest effect on achieving an objective sought, which was disruption and delay in the Soviet planning process.

Now the imposition of an import control might very well take a much larger field of view. And it might be used excessively.

Senator HEINZ. It is discretionary.

Mr. OLMER. Yes.

Senator HEINZ. And in the report we try to spell out that it is supposed to be used with restraint. I'm not quite clear on why you do object to the discretionary import control authority in section 6.

Mr. OLMER. Well, among other things, if applied——

Senator HEINZ. Apart from the fact you didn't ask for it. At least you didn't ask for it the second time around.

Mr. OLMER. Apart from that point, Senator Heinz, it clearly would violate our GATT obligations if applied against a GATT signatory country, and there are over 100 signatories to the GATT code.

Senator HEINZ. Can I follow that up? We imposed import controls on Libyan oil. Libya is not a member of the GATT. I assume that you don't contend we were in violation of the GATT when we imposed such import controls on Libya?

Mr. OLMER. No, no. I say it would violate GATT if applied against a GATT signatory country. And in the case of Libya, it was done pursuant to the imposition of emergency economic conditions.

Senator HEINZ. So we agreed that the application of import restrictions against non-GATT members is not a violation of the GATT?

Mr. OLMER..I'd certainly want the lawyers to have the last word, but this lawyer says that it would not.

Senator HEINZ. Is there a lawyer at the table? On the last statement, that the application of import restrictions against a non-GATT member is not a violation of the GATT?

Mr. ALDONAS. I'm trying to envision situations where it might be, as opposed to answering directly to your question. I think that it does open up opportunities for complaints by other GATT signatories. I wouldn't want to express the opinion that it was strictly in violation of the GATT accords.

Senator HEINZ. I'll put you down for mainly agreeing with what I said, I think.

Now let me ask you this. The members of the European Community recently imposed foreign policy import controls against Argentina during the bulk of the war, the Malvinas war. Argentina is a member of the GATT. Did the United States make a protest to the GATT that these controls were a violation of these countries' GATT obligations?

Mr. OLMER. Not to the best of my knowledge, no.

Senator HEINZ. Did any other country to your knowledge make such a protest?

Mr. ALDONAS. As I understand it, the situation was raised specifically by the British, and they defended it on the grounds of the national security exception under, I think, article 21 of the GATT.

Senator HEINZ. Very well.

Mr. MCCORMACK. And there is a specific provision in the GATT which covers the national security, but it doesn't cover all the other foreign policy controls that we might need.

Senator **Heinz**. We are talking about foreign policy.

Mr. **Aldonas**. That's right. And there the GATT doesn't give you an out.

Senator **Heinz**. That's right.

My understanding is that they didn't impose national security import controls. They imposed foreign policy controls.

Mr. **McCormack**. Well, they said they were at war with Argentina.

Senator **Heinz**. The EC?

Mr. **McCormack**. Yes. The British specifically did.

Senator **Heinz**. No, no. I'm going beyond the British to other EC countries. And I'm talking about the European Economic Community on the continent. And you are saying it is your understanding that their import controls were for national security purposes even though they were not party to the conflict?

Mr. **McCormack**. I'm saying that the British control, but the others did not.

Senator **Heinz**. All right. Thank you.

My point isn't exactly that. They were foreign policy import controls by the French, the Germans or the others. And you agree with that?

Mr. **McCormack**. I would agree with that.

Senator **Heinz**. Thank you.

Mr. **Aldonas**. Senator Heinz, rethinking an earlier statement, I would like to amplify on a comment. We do have treaties of friendship, commerce, and navigation with a number of countries that may, in fact, not be signatories of the GATT. Quantitative restrictions on imports might also violate those international obligations as well as the GATT.

Senator **Heinz**. Well, presumably, we are imposing a foreign policy control on them under the Export Administration Act—then they are no longer our close friends. Again, you've got to be careful of disaggregating what we are talking about here.

I have one question about the list of economic sanctions for foreign policy goals that was made available to all members of the committee. Have any of you gentlemen analyzed the extent to which these have, in fact, been imposed under the Export Administration Act?

It is my understanding that a number of these simply have not been imposed under the Export Administration Act specifically under section 6. They may have been imposed for foreign policy reasons under other acts.

Mr. **Aldonas**. You are referring to the embargoes with respect to the trading with the Enemy Act or sanctions against Iran under the International Emergency Economic Act?

Senator **Heinz**. Or the nuclear explosion—with regard to India which was a separate act and so forth.

Mr. **Aldonas**. That's correct.

Senator **Heinz**. So there's a significant number of these that simply weren't imposed under the Export Administration Act?

Mr. **Aldonas**. But they are administered through the Department of Commerce, basically, for administrative——

Senator **Heinz**. My last set of questions—if the chairman will bear with me—I know I've taken a lot of his time.

Senator **Danforth**. Yes.

Senator HEINZ. This is the tough panel, Mr. Chairman. And I appreciate your calling hearings. And hear, we will. I was not in favor of calling hearings, but if we are going to have them, we are going to hear from these people because they've been brought up here to support a point of view that I don't particularly agree with. And we are not just going to have their side of the story on the record.

Senator DANFORTH. Go ahead.

Senator HEINZ. I understand the concerns that Secretary Olmer has about jurisdiction for enforcement shifting from Commerce to Customs. But equally, I honestly fail to understand how maintaining the primary responsibility for enforcement in Commerce can possibly take place without overlap, duplication, and confusion.

Now, Secretary Olmer, foreign investigations are an integral part of our efforts to prevent critical and high technology from falling into the hands of the Soviets and their allies. But isn't it true that the Commerce Department is barred by German authorities from investigating diversion cases in Germany, one of the key transshipment points that has been identified?

Mr. OLMER. Barred, Senator Heinz?

Senator HEINZ. Barred by German authorities from investigating in Germany diversion cases in Germany.

Mr. OLMER. Not to the best of my knowledge and belief. But I will be happy to inquire of my German colleagues, and advise you forthwith.

Mr. MCCORMACK. I can say that they have protested vigorously to my personal knowledge.

Senator HEINZ. Do they protest vigorously with the Customs Service in such an investigation?

Mr. MCCORMACK. Yes. They have personally protested to me on it.

Senator HEINZ. Now I understand that there has been lengthy correspondence between your Department, Secretary Olmer, the Commerce Department, and Secretary Walker's office concerning the issue of these overseas investigations. Where do those exchanges of correspondence now stand? And have they been resolved?

Mr. WALKER. It's curious that you should mention this, Senator, because just a few minutes ago Secretary Olmer and I were discussing the need to further confer and get together to resolve whatever outstanding issues there are between our respective services.

There are pending issues still to be resolved, I think, with respect to foreign investigations, and how they will be conducted. That is one of the issues that is still outstanding.

I think that we would like very much to get together to resolve these issues. So far, we have not been immediately successful. There have been concerns raised on both sides, which have not permitted prompt resolution.

Senator HEINZ. I will return to that in a minute. I want to ask Secretary Olmer one or two more questions.

Secretary Olmer, you really suggested in your testimony that Commerce ought to be in charge of all these critical technology enforcement issues. Are you suggesting that the Customs Service stop doing critical technology enforcement, or that Operation Exodus be terminated?

Mr. OLMER. I'm not suggesting that Customs stop one thing that it now does.

Senator HEINZ. You are suggesting that Commerce basically increase the number of people, and that they be involved in direct enforcement?

Mr. OLMER. I'm suggesting—the administration is suggesting that the Commerce Department continue in its present role, and the Customs Service continue in its present role.

I would not want to let lie for the record your statement about overlapped redundancy, which I thought was redundant.

Senator HEINZ. You will have a chance to rebut that in a minute. It's my personal opinion. It doesn't stand as the opinion of others. I will identify it as such.

Mr. OLMER. Could I comment about your remark regarding the German authorities?

Senator HEINZ. Yes, if you would like.

Mr. OLMER. I will inquire of it personally, myself, this afternoon. I do not know of any such incident at the present time.

Senator HEINZ. I would appreciate it.

Mr. OLMER. The incident Mr. McCormack refers to he says occurred a year or more ago. Deputy Assistant Secretary Wu, who is in charge of our enforcement efforts and who in the last year has made a number of trips around the world on Cocom enforcement harmonization, is not familiar with anything of a more recent vintage.

I would like to add I am struck by your concern for the German authorities in this instance, and not in the instance wherein we might impose import controls on German authorities.

Senator HEINZ. No, the question was not with respect to import controls. It was with respect to enforcement of export controls, and the ability of the Commerce Department to be allowed on the scene to do any investigations.

Mr. OLMER. Well, I have no knowledge of our being impaired in any respect.

Senator HEINZ. Well, if you will get that answer. With respect, though, to the gearing up of the Commerce Department to do more enforcement, which I understand you plan to do, I understand you plan to have the Foreign Commercial Service officers play some kind of role here, at least with respect to information gathering. And I would like to ask you, since I think it's very difficult to conceive how you can have somebody whose job is supposed to be export promotion—that's what this committee seemed to recollect was intended about 4 years ago when we signed off on this notion—get involved in enforcement, and what is regulation. And it seems to me that that is a dangerous practice, specifically because when it becomes known that those officers are involved in enforcing export control laws, even if only to gather information, no foreign business will be anxious to deal with them.

What is being done to insulate those FCS officers from being involved in enforcement related activities?

Mr. OLMER. Well, in the main, I don't think they need to be insulated because I do believe there is a proper role for them to play.

And the kind of role that we have structured for the Foreign Commercial Service is to help in the identification of foreign firms who are the intended recipients of U.S. exports. As for example, in making a precheck on the issuance of a license, our office in Washington or one of our district offices could alert one of the 121 hosts in 66 countries as to the impending shipment of a U.S. export, and inquire as to the bona fides of the listed recipient. It is far more easy for a local official in the Embassy to determine whether or not a recipient is legitimate or not legitimate. Similarly, the Foreign Commercial officer has been useful in providing us with an assurance that the shipment once made, has, in fact, gone to the intended recipient, and is being used as it is supposed to be used.

We, as I am sure you are aware, are required on shipment of certain kinds of sophisticated equipment to make inspections to assure that the equipment remains where the license authorized its presence. And the Foreign Commercial officer could make that kind of check.

Not only is that not an interference in his normal duties, I think it does expand the range of contacts that the officer would have. And it does make a very useful contribution to the body of information necessary to make a license determination. And would also assist in the process of aggregating information on an investigation regarding an alleged violation of export regulations. So I wouldn't try to cut them out. I would try to limit, clearly, and define sharply, no question, what their role is. But I think it is a legitimate role, and we would be hard put to provide an alternative to.

And I would further point out that prior to the State Department having transferred to the Commerce Department in 1979 responsibility for the Foreign Commercial Service, this kind of function was performed by State Department economic officers. And it continues to be performed by State Department economic officers either in those posts where there is not a Foreign Commercial Service officer or where there may be, and there is a conflict in priority.

Senator HEINZ. Now the administration bill, which retained enforcement authority, in effect, in the Commerce Department, did not give the Commerce Department any new authority such as the typical law enforcement authority is expected to have—arrest authority, search warrants, the conduct of warrant searches, carrying firearms, and the traditional tools provided to our law enforcement agencies.

Now you and others in the Commerce Department have been lobbying against certain provisions of S. 979, with the argument that they are not in the administration bill, and are therefore not administration policy. Is the administration somehow opposed to giving Commerce agents—the ones that are supposed to enforce this bill—these kind of law enforcement powers?

Mr. OLMER. Well, Commerce officials do enforce. They are supposed and do enforce the Export Administration Act, Senator. And the administration is currently in the process of conducting a comprehensive review of all law enforcement authorizations within the executive branch of Government. That is, whether or not the—well, there are some 90 to 100 agencies, I am told, who have authority to carry firearms. It is the belief of the chief law enforcement officer of the Government, the Attorney General, that things have been allowed to grow and not out of design and he is leading an effort to review this comprehensively. And my guess is that the question of whether Commerce should or will be given that authority is not only going to be answered by the Congress, but as an outgrowth of this inquiry which is not yet completed.

Senator HEINZ. But isn't it true that with respect to something as necessary and as basic as a search warrant, which you have to have in order to get some evidence, that the Commerce Department does not have that kind of tool; yet wants to retain control over enforcement. They don't have the specific tools.

Mr. OLMER. Well, we do not have several of the tools which are commonly available to law enforcement officers. That is correct. I do not believe that is in any way dispositive of the question of whether the Department can do a useful job, productive job, satisfactory job in enforcing the act. I would point out the *Brauchhausen* case, which is perhaps the most notorious in recent years of technology diversion, began because of a Commerce Department enforcement official being notified by a contact in the American business community, and our participation in that investigation was not hampered by the absence of the ability to search, seize, or arrest.

Senator HEINZ. The Inspector General of the Commerce Department had a different view, as you know. Is there a comment?

Mr. OLMER. In this administration?

Senator HEINZ. The just-previous Inspector General.

Mr. OLMER. Well, if the question is whether I believe the Commerce Department enforcement operations requires those kinds of law enforcement tools, I don't mind being quoted as having said, "Yes, I do." And I have tried to make that case, and am trying to make that case within the context of the administration's review of this study by the Attorney General. I will live, obviously, with that decision. And it hasn't been resolved yet. But, sure, I think it would be useful. It's desirable for a whole range of reasons.

Senator HEINZ. Secretary Olmer, thank you.

Mr. Walker, the report of the Banking Committee on the bill before us said in part:

> The Committee believes that for the Commerce Department to do an adequate job of enforcing the Act, it would need to duplicate the current Customs operations. The Department would need to add hundreds of people, and make major increases in administrative staff with experience in law enforcement. Since in virtually every instance where an enlarged Commerce enforcement operation would be placed a Customs operation has already been established, the Committee believes that the wisest move to enhance enforcement of the Act is to rely on the experience and resources of the Customs Service, which are already in place and doing an effective job so far as export control enforcement has been delegated to the agency.

Let me ask you, what, if anything is wrong with that statement?

Mr. WALKER. Well, just as Mr. Olmer has been making a case—trying to make a case on police powers coming to the Commerce Department in the administration, and the matter has been under review, Treasury also has been basically taking positions which are more in line, I think, with your bill. But the administration has decided to basically adhere at this time to the joint jurisdiction status quo approach that is implicit in the bill that the administration has presented.

Senator HEINZ. I understand that. My question was a little different, as I think you realize.

Mr. WALKER. I think that the answer to your question depends to the degree to which Commerce would want to basically increase its resources and seek to open offices in the various areas where Customs is currently located.

Senator HEINZ. Now some people say that would be duplicative. Would you agree or disagree?

Mr. WALKER. Well, I think if it were done, certainly it could be duplicative. I'm not sure that it would be done. What would have to be resolved in any joint jurisdiction situation is a whole series of agreements that would have to be entered into between the two departments to avoid duplication. And I think that we would work towards that goal.

We would have to work them out through agreements—given the administration's position on the responsibility for foreign investigations—how those would be handled, the extent to which there would be a system of coordination of foreign investigations, and the extent to which a single agency would be responsive to foreign law enforcement and accountable to foreign law enforcement as it pursues foreign investigations. And I think that is maybe something that would have to be worked out. There seem to be differences on that score at the present time.

Another area would be access to records within the administration. Commerce's license denial records, and so forth. And, I think, again that is something that can be worked out. Right now there seems to be some differences on that score.

Those are the principal areas that I would see. Let me say that I do feel cooperation is possible in this area. I'm not one of these ones who say that it is flatly impossible for two agencies with cojurisdiction to work things out. We have seen in the drug area that DEA and Justice and the FBI work things out, and indeed, Customs and DEA have had a good working relationship in the drug area despite concurrent jurisdictions. So I'm not pessimistic about the prospects of working out these differences consistent with the administration's bill as proposed.

Senator HEINZ. You mentioned the foreign investigations area. We discussed that briefly a few minutes ago. Isn't the Customs Service much better suited than Commerce to conduct foreign investigations, particularly in the area of critical technology, because of Customs' traditional working relationships with foreign law enforcement where Customs and the foreign agency perform services for each other?

Mr. WALKER. Well, that happens to be my view. Again, this is an issue that hasn't been worked out. We don't have a final decision from the administration on it; it is still under review.

Senator HEINZ. Thank you.

Mr. Chairman, thank you very much. I appreciate the opportunity to go into these issues indepth a second time. We did go through these issues once in the Banking Committee. We have about 1,400 pages of testimony. But I don't think we need to recreate any more of those pages here. Thank you.

DEPARTMENT OF THE TREASURY
WASHINGTON, D.C. 20220

ASSISTANT SECRETARY

AUG 17 1983

Dear Senator Heinz:

As a follow-up to a question you asked Commerce Under Secretary Lionel Olmer at the August 4 hearing regarding the status of Commerce enforcement in Germany, I have received a report from Customs, contained in a memorandum to myself from Acting Commissioner Alfred R. DeAngelus, which is self-explanatory. A copy of this memorandum is enclosed.

Sincerely,

John

John M. Walker, Jr.
Assistant Secretary
(Enforcement and Operations)

The Honorable
John Heinz
United States Senate
Washington, D.C. 20510

Enclosure

UNITED STATES GOVERNMENT
Memorandum

DEPARTMENT OF THE TREASURY
UNITED STATES CUSTOMS SERVICE

DATE: AUG 11 1983

FILE: INV 6-03 E:I:S

TO: John M. Walker, Jr.
Assistant Secretary
(Enforcement & Operations)

FROM: Acting Commissioner of Customs

SUBJECT: Preclusion of Commerce Investigations in Germany

As you know, on August 4, 1983, Department of Commerce Under Secretary for International Trade, Lionel Olmer, testified before the Senate Finance Committee. Mr. Olmer was asked by Senator Heinz whether or not it was true that Commerce officials are forbidden by German authorities to conduct investigations into violations of the Export Administration Act in the Federal Republic of Germany. Mr. Olmer stated that, to the best of his knowledge, this was not true, and consulted with Deputy Assistant Secretary Theodore Wu. Mr. Olmer then stated positively to Senator Heinz that it was not true, but that he would make immediate inquiry anyway.

On February 18, 1983, an American Delegation including William Rudman, Director, Strategic Investigations, U.S. Customs Service, and Viktor Jacobson, the U.S. Customs Service's Attache in Bonn, as well as Mr. Wu, met with officials of the German Government in Bonn under the aegis of COCOM to discuss export enforcement. At that time, the German Government stated its position that all export control investigations in Germany must be conducted by U.S. Customs officials under the authority of the U.S. Customs-German Customs mutual assistance treaty. The German Government also stated that Commerce could not conduct any pre-license checks or post-shipment verifications without an agreement between U.S. Customs and the Department of Commerce.

No such agreement exists. Customs Attache Jacobson has been repeatedly asked by German authorities if the Department of Commerce is respecting the rules laid down by them at this meeting.

As you can see, this information indicates that Mr. Olmer's testimony was in error. Furthermore, Customs has in its possession cable traffic which shows that Commerce is not respecting the guidelines laid down by the Germans and will provide these cables to you if you desire to see them.

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Senator DANFORTH. Senator Baucus.

Senator BAUCUS. Mr. Chairman, thank you.

Mr. Olmer, is it your view that section 7(g)(3) of the bill is unconstitutional under the so-called legislative veto provision, the Supreme Court's recent decision in the *Chadha* case?

Mr. OLMER. Senator, you've caught me unprepared. I don't think I can give you an answer on that question.

Senator BAUCUS. Well, it's my understanding that the *Chadha* case was decided just after the Banking Committee marked up this bill. And that decision, as you know, held that legislative vetoes are unconstitutional. In your view, after the *Chadha* decision, is the legislative veto provision in section 7(g)(3), as marked up by the Banking Committee, unconstitutional? [Pause.]

Mr. OLMER. The view of the general counsel of the Commerce Department is that it is unconstitutional.

Senator BAUCUS. And is it also your view, or the view of the general counsel, that section 7(g)(3) is severable from the bill so that the rest of the bill remains valid?

Mr. OLMER. Oh, yes, sure.

Senator BAUCUS. What would the administration's view be if Congress were to enact some provision to amend the bill to reassert congressional control over embargoes? One possible provision, as you know, is one providing that any embargo, such as the grain embargo, would last only for 60 days unless the Congress by joint resolution affirmatively agreed to extend the embargo. What would the administration's view of that provision be?

Mr. OLMER. Well, our general view is that there should be no interference with the authorities of the President in the field, in this particular field. And that that would be an unwarranted and undesirable restraint on his freedom of action.

I'd like to look at that provision more carefully as it was drafted.

Senator BAUCUS. I think that is a provision that Senator Dixon is circulating. Various Senators have signed on a letter advocating that position, this Senator included. I'm sure Senator Dixon and myself can get you a copy of that letter.

It's also the same provision that has either been proposed or already adopted in the House. And I must say that, frankly, I think it's a good idea. We can't overturn the Supreme Court. But we can use various other means to address the same issue. And I think that this approach—that is, that an embargo must be affirmatively extended by joint resolution of Congress within 60 days, strikes a proper balance. The President could embargo for 60 days, but within the 60-day period, he would have to have a joint resolution passed by Congress agreeing with the embargo.

Mr. OLMER. Senator, it goes to the question of the foreign policy authorities that are elsewhere in the act, it seems to me. And it would be undesirable for that reason. I understand in this case it is applied to agriculture, but I do think the principle is relevant to the President's exercise of foreign policy responsibilities, and that he shouldn't be hampered by a time limit such as 60 days.

Senator BAUCUS. Do you think the grain embargo is effective as a foreign policy tool?

Mr. OLMER. I think that the grain embargo had some short-term beneficial affect, but that it was properly lifted when the President decided to lift it.

Senator BAUCUS. What was that short-term beneficial effect?

Mr. OLMER. It occurred, I recollect, in the middle of a grain buying year. And it was very disruptive to Soviet plans. They eventually obtained the grain they wanted, but at a higher price, lesser quality, and it did cause them, as I say, some disruption in their own purchase planning process.

Senator BAUCUS. Do you know how much disruption it caused them?

Mr. OLMER. A sufficient amount to cause them to complain rather bitterly. In dollar terms I don't have a number, but I do believe that it was significant.

Senator BAUCUS. Do you know any farmers that think that was a good policy?

Mr. OLMER. I do not know of any U.S. farmers. I know of a number of Argentine farmers who thought it was a pretty good idea.

Senator BAUCUS. What country do you represent? [Laughter.]

Mr. OLMER. Well, you have to remember that President Reagan did lift that grain embargo rather smartly and swiftly after assuming office in 1981.

Senator BAUCUS. That would imply it's not a good idea.

Mr. OLMER. It was not a good idea at the time he lifted it for that embargo to be in place. But that is not to say that it was completely wasteful and without any beneficial effect.

Senator BAUCUS. Well, I suggest very strongly that you adopt the position that you are going to negotiate with the Congress—to help come up with a workable provision. Because, I will tell you right now, that this Senator is going to push for that amendment, if no other Senator does. And I know many other Senators will. There has to be an accommodation here.

We recognize the President's foreign policy powers, explicit and implied, under the Constitution. But also recognize the legislative powers of this Congress under the Constitution. And, further, on another level, it's just bad policy to embargo grain. The Soviet Union is going to get that grain through Argentina—as you have indirectly implied—and through other sources. An embargo will not disrupt the Soviet Union enough to force them to stay out of Central America or wherever. In my view, it just will not have that effect. And I think that most other observers—except some people from urban areas—probably would agree. So I strongly suggest that the administration adopt the position that it will negotiate constructively with the Congress and help come up with a workable provision. And this Senator is going to press very vigorously for the kind of provision that I have just outlined.

Mr. OLMER. Senator, we certainly would look forward to constructive negotiation, but I would like to emphasize that—you suggested the possibility of a grain embargo against the Soviets for conduct in Central America. There is no such consideration underway.

Senator BAUCUS. I know.

Mr. OLMER. And I can contemplate no circumstances under which it would be considered.

Senator BAUCUS. Well, I'm glad to hear you say that, because one Senator suggested such an action. It's in the press, too.

Thank you.

Senator DANFORTH. Gentlemen, thank you very much.

Senator Baucus has a statement which he has submitted for the record. Also Senator Nunn has some written questions for Secretary Walker. If you could answer them for the record.

[The questions from Senator Nunn and Assistant Secretary Walker's answers follow:]

Question: The Permanent Subcommittee on Investigations' report outlined that Customs is a law enforcement organization with experience in law enforcement going back to the founding of the country. Its agents and executives are fully trained peace officers who work within a Cabinet-level Department whose senior officials have diverse and long-time experience in law enforcement operations. Conversely, the Permanent Subcommittee on Investigations observed that Commerce has very little experience in law enforcement; and, as a consequence, has tended to neglect the law enforcement responsibilities it was given in the export control field. The Subcommittee found that until quite recently, the Commerce Department had assigned personnel to the export control function with very little training in law enforcement. Do you agree or disagree with this judgment?

Answer: I agree with that judgment. Customs' long history in investigating complex criminal cases is highly respected in law enforcement circles. This same high respect is also applicable to its investigations of export control cases over the past 30 years. Customs has over 800 experienced criminal investigators in offices across the nation and around the world. This expertise in criminal investigations is what the Customs Service has brought to the enforcement of the Export Administration Act (EAA).

Commerce's Office of Export Enforcement has approximately 45 recently hired officers located in Washington, New York, Los Angeles and San Francisco.

Question: It was the conclusion of the Permanent Subcommittee on Investigations' report that the Customs Service has experienced and fully trained law enforcement officers throughout the world working in close harmony with their host countries' law enforcement counterparts. These working arrangements are set forth in treaties and Customs agreements and other international compacts between the United States and the host countries. Conversely, according to the Subcommittee, the use of Commerce Department investigators in foreign countries has no diplomatic precedent and has the potential for offending the sensibilities of the host countries. Do you agree or disagree with this judgment?

Answer: I agree. The duplication of our Export Administration Act (EAA) enforcement effort overseas in full view of our allies and friends is self-defeating and frequently embarrassing. Some of our foreign counterparts have recently questioned which United States agency should be contacted regarding export violations. This confusion has strained certain long-standing relationships that Customs has fostered for many years in its foreign offices. Officials in the Federal Republic of Germany, for example, have stated their desire to work only with the U.S. Customs Service on export cases due to its expertise and effectiveness and because of treaty commitment. There can properly be only one United States enforcement agency abroad conducting liaison with foreign law enforcement agencies and that agency should be the one already in place and functioning efficiently—the U.S. Customs Service.

Our national and international export control efforts are extremely important to this country's national security. Each agency (Commerce and Customs) has a vital role to play in this effort.

Question: Another conclusion of the Subcommittee was that there has developed a counterproductive competition between the Commerce Department and the Customs Service with regard to export controls and that it is not conducive to effective government operations to assign two agencies the same task. It is the Subcommittee's concern that as the Commerce Department seeks to strengthen its own capabilities in export control enforcement, the competition will only be aggravated and that the seeds of a fierce inter-agency competition are being sown. Do you agree or disagree?

Finally, I would ask you, Mr. Walker, which component of the government—the Customs Service, or the Commerce Department—do you believe should have responsibility for enforcement of the Export Administration Act?

Answer: The Customs Service and the Commerce Department are currently involved in EAA enforcement functions some of which are duplicative.

The Customs Service has the manpower, the experience and the knowledge to deal with the illegal export of strategic commodities and to investigate EAA violations. Commerce is solely responsible for licensing determinations, post-shipment verifications and collecting data on American exports. I must conclude that, regrettably, there is today harmful competition between Commerce and Customs in the area of foreign investigations of EAA violations which can only tend to weaken export enforcement overall.

I believe that the Customs Service should be the primary agency responsible for criminal investigations of violations of the Export Administration Act (EAA) and solely responsible for liaison with foreign law enforcement agencies in the conduct of enforcement investigations.

Question: Many of this nation's border enforcement functions have resided within the Customs Service since the country was founded. Conversely, the Commerce Department has very little experience in border responsibilities. Do you agree or disagree?

Answer. I agree. Customs has always been the primary enforcement agency at this country's borders. In this regard, it should be noted that Customs has had unique border search and seizure authority since the founding of our nation. Accordingly, United States Government agencies look to Customs for assistance at our international borders.

For instance, Customs is the sole United States agency responsible for the enforcement of the Arms Export Control Act (AECA). Investigations of violations of the EAA and AECA are similar and frequently overlap. Thus, Customs is ideally suited to enforce the EAA.

[Senator Heinz' questions and Assistant Secretary Walker's answers follow:]

Question: Although Commerce has statutory authority to enforce the Act, isn't it true that they lack the enforcement powers to accomplish the mission? Aren't Commerce agents powerless to make arrests, serve search warrants, conduct warrentless searches at our nations borders, take sworn statements under oath or carry firearms? Is there any reason we should be creating a new police force?

Answer: The Commerce Department does have the statutory authority to conduct investigations under the Act. However, pursuant to Section 386.8 of the Export Administration Regulations, the Department of Commerce has authorized and directed the United States Customs Service to take appropriate action to enforce the Export Administration Act of 1979. This delegation is covered under regulation 15 CFR parts 386 and 387.

Despite its statutory authority, the Commerce Department does not have the enforcement powers to enforce the Act. Commerce officers do not have authority to make arrests, serve search warrants, or conduct warrantless searches at our nation's borders. (This particular enforcement authority is only delegated to the Customs Service.) Commerce officrs cannot take sworn statements under oath, nor are they allowed to carry firearms. In order to take any law enforcement action, Commerce officers generally employ the services of United States Marshals. Although Marshals are trained and qualified to carry out certain law enforcement functions, they lack the subject matter expertise and knowledge of violations of the Export Administration Act. Customs Special Agents are both trained in and enpowered with law enforcement powers (including border search powers which even United States Marshals lack). Further, Customs Special Agents have extensive experience in the conduct of export investigations and can perform effectively all tasks necessary to carry them out fully.

The Department of Justice has written to the Director, Office of Management and Budget, regarding the Department of Commerce's position that its officers should carry guns, make arrests, execute search warrants or make seizures. The Justice Department, citing a concern over the proliferation of law enforcement powers where existing agencies are performing the same work, has recommended deferring the Commerce issue until an appropriate high level policy body can examine it in the overall context of proliferation of law enforcement agencies government-wide.

Question: As the operational officer over BATF, Secret Service and Customs, does the request for Commerce to carry firearms and increasing their seach, seizure and arrest authority cause you any concern?—I am sure the Justice Department must have some reservations.

Answer: I believe my answer to the previous question covers this one.

Question: Can the Export Administration (Act) be adequately enforced if it were left solely to the Commerce Department? If so, under what conditions and with what resources?

Answer: The Export Administration Act cannot be adequately enforced if left solely to the Department of Commerce. Although Commerce has statutory authority to conduct investigations under the Act, that Department lacks the enforcement powers to accomplish the mission as I have indicated above.

If the Commerce Department were the sole agency carrying out enforcement of the Export Administration Act (EAA), this country's efforts to stop the flow of strategic commodities and state-of-the-art technology would be wholly inadequate. There is no dispute within the administration on this issue. On August 11, 1983, Under Sectetary Olmer testified that Customs must continue to fully enforce the EAA.

The Commerce Department, Office of Export Enforcement, currently has a total staff allocation of 88 positions which include intelligence analysts, inspectors and support personnel as well as investigators. Their overseas offices are staffed with Commercial officers whose primary function is to promote sales of United States products abroad.

The Customs Service employs 800 special agents who are fully trained and qualified to conduct all types of investigations. There are nearly 4,500 Customs inspectors and 1,200 patrol officers, a large portion of whom are assigned to export enforcement. Customs has over twenty full-time criminal investigators abroad, in eight foreign offices, who are familiar with foreign police practices as they relate to export investigations. These agents assigned overseas are there solely to enforce certain laws of the United States and have no other functions.

Question: Would you agree, that if these issues were devoid of politics and the traditional turf battles between Departments, there would be no question that Customs would be the logical agency for enforcement?

Answer: I would agree with that position.

Question: Mr. Walker, it appears to me, from what I can learn from the appropriations people, Commerce is trying to *duplicate* what Customs already has in place, both in equipment and personnel—where we are trying to hold down budget levels—doesn't that type of request concern you and the Administration?

Answer: This Administration is concerned about any unnecessary duplication of tasks. We fully realize that duplicate efforts are uneconomical and are detrimental to an austere budget.

The Treasury Department is making a sincere effort to resolve this issue by avoiding duplicate enforcement efforts between Commerce and Customs.

Question: If there is no change in foreign enforcement responsibility for the Export Administration Act from the current status quo, does Treasury anticipate enforcement problems by having two agencies involved and how will Treasury address these problems?

Answer: As long as there continues to be a lack of clear definition as to foreign enforcement responsibility, it is likely that enforcement problems overseas will persist. The Customs Service currently conducts the majority of the foreign investigations relating to illicit technology transfers. Customs investigators who are assigned to foreign offices have daily contact with their foreign counterparts, as the law enforcement agencies support each other. This day to day contact is enhanced by mutual respect, as well as Customs agreements between this country and several foreign countries. In the past year there have been several instances where Commerce Department investigators have independently conducted their own investigation in a foreign country. Several of these incidents have caused the foreign government to raise the issue of sovereignty and request compliance with established mutual assistance agreements and the Customs Cooperation Council Mutual Administrative Assistance Agreement of December 5, 1953.

For the past year, the Treasury Department has attempted to negotiate a Memorandum of Understanding with the Commerce Department in an effort to resolve the issue of foreign enforcement of the EAA in order to fully and properly utilize its network of foreign offices and career criminal investigators, numbering more than twenty, stationed abroad in eight foreign offices. Customs will continue to make this effort.

Question: If enforcement of the Export Administration Act were transferred to the Customs Service, as provided for in S. 929, would that reduce the Customs Service's effectiveness in enforcing other laws currently under its responsibility?

Answer: No. Since its founding almost 200 years ago, the Customs Service has, besides its primary task of protecting the revenue, been required to enforce some 400 statutory and regulatory requirements on behalf of approximately 40 other Federal agencies. The Customs Service has approached the enforcement our U.S. export laws with the same professionalism as with all of its enforcement responsibilities. The success, to date, of EXODUS proves that the Customs Service can enforce the provisions of the EAA, similarly as effectively as Customs has enforced the Arms Export Control Act for the Department of State, with no loss of effectiveness to other responsibilities.

Question: Has Operation EXODUS, to date, been pursued to the detriment of the Service's other enforcement responsibilities?

Answer: No. The Customs Service is convinced that Operation EXODUS has enhanced its overall enforcement program. Because EXODUS is a high Administration priority, Customs has refined its contacts with various intelligence agencies. This emphasis on increased contact with other agencies regarding the illegal export of high technology has resulted in increased investigative leads concerning other enforcement areas for which Customs has direct responsibility.

The attention which Customs is devoting to illicit exports from this country and by means of EXODUS has complemented the work being done by the Service in combating illicit drug and other imports as well. Customs has the reputation as being the nation's border "protector" and our actions in preventing exports potentially harmful to the national security have enhanced this reputation.

Customs is well aware of the need for liaison with foreign counterparts and the importance of export enforcement, not only in the area of high technology, but also in arms trafficking and money laundering. EXODUS is not new jurisdiction, just a more coordinated, efficient use of added resources of its existing jurisdiction.

Question: Most complaints I've heard in the export control area concern licensing procedures. It often takes a long time for the Commerce Department to make a determination as to whether or not a license is required for a shipment. If that is where the bottle neck is, in terms of holding up shipments, doesn't it make more sense for the Commerce Department to put its resources in the licensing area and speed that up rather than trying to duplicate what the Customs Service is already doing in the inspectional and investigative area?

Answer: Customs detentions are referred to the Commerce Department through the EXODUS Command Center within 24 hours excluding weekends. The time required to obtain a licensing determination from Commerce varies, ranging from a few days to a few months, thereby creating delays for exporters. The reason for such a delay lies partly in the sophistication of the technology under consideration. (Less sophisticated items require less time to make a determination and vice versa.) Such delays affect many of our export investigations, as well as the exporter whose shipment is being delayed. With an average of 70,000 license applications annually being submitted to Commerce it would appear matters could be more expeditiously handled if more resources were allocated to the Commerce licensing function.

Question: The Department of Defense transferred approximately $20 million to the Customs Service to carry out Operation EXODUS this year. Why do you think Defense transferred this money to the Customs Service rather than the Office of Export Enforcement in the Commerce Department?

Answer: The U.S. Customs Service is well suited to enforce both the Export Administration Act and the Arms Export Control Act. Customs has a highly trained contingent of 800 criminal investigators, 4,500 inspectors and 1,200 patrol officers geographically located at strategic export locations and in close proximity to manufacturers and shippers of high technology.

Additionally, Customs has the unique statutory authority to make arrests, conduct warrantless searches and seizures in border areas and to require production of export records for examination. The Commerce investigators do not have either arrest or border search authority.

The results from the first year of our Operation EXODUS program clearly demonstrated that Customs is on the right track toward accomplishing our goal. The Department of Defense recognized our contribution to the national security through EXODUS. Assistant Secretary of Defense Richard Perle, in a speech before the International Institute for Strategic Studies Conference in Ottawa, Canada, on September 8-11, 1983, stated that ". . . EXODUS deserves special praise . . . ". Deputy Assistant Secretary of Defense Dr. Stephen D. Bryen in the May 25, 1983 issue of journal of Electronic Defense, stated that ". . . EXODUS should be singled out for special comment. . . . If the other members of COCOM had a system in place like EXODUS, a considerable part of the technology transfer problem could be solved. . .".

Customs is a highly visible force in the area of export control, having the staff, the equipment, the know-how, and the contacts to effectively perform its mission. We believe the Department of Defense transferred funds to Customs due to our proven track record of past, as well as potential achievements in export enforcement.

Senator DANFORTH. It may be that some other Senators also have some questions to submit to you.

Senator BAUCUS. If I might add, just briefly, Mr. Chairman, we in the Northern States, Northern Midwestern States are very concerned about the proposed transfer of Customs' employees and the proposed withdrawal of some Customs' operations because, as you know, the United States has more trade with Canada than with any other country. As therefore, I will be reviewing the bill to assure that it does not reduce Customs service to that part of the country.

Senator DANFORTH. Thank you, gentlemen.

Next we have a panel consisting of Professor Abbott, Mr. Steinwig, and Mr. Milosh.

[Pause.]

Senator DANFORTH. Professor Abbott.

STATEMENT OF PROF. KENNETH W. ABBOTT, NORTHWESTERN UNIVERSITY SCHOOL OF LAW, CHICAGO, ILL.

Professor ABBOTT. Mr. Chairman, I would first like to say briefly that as a professor of law, my teaching and research have been in the area of international trade, particularly trade controls. I'm here only out of interest in and concern over the subject. I'm not representing any person or group in my appearance. I also apologize for not having a written statement. I haven't been in town since I received the invitation to attend.

I don't feel that I'm qualified to address the issue of enforcement responsibility, and I will leave that to others. I do want to address both of the import provisions before this committee, however.

I find both of these provisions troubling, and I hope that neither is adopted in its present form. I'm in the unaccustomed role of supporting the administration on this issue, and I will be repeating some of the things their witnesses have said.

First, as to import controls to enforce national security controls, if this provision were designed to apply only to American exporters violating American national security controls, there would not be a great deal to say about it. Beyond that, however, Secretary Olmer says that it would be particularly useful in enforcing American extraterritorial national security controls. And I can see how that is true. But the difficulty there is the fundamental problem of the propriety of the extraterritorial trade controls themselves. On that, the administration and I differ strongly. But that issue is too broad to go into here.

The most serious problem with the provision is that, as the Banking Committee report itself makes very clear, the provision is designed to be applied against foreign exporters who export foreign origin goods in violation of foreign export control regulations, so long as those regulations are adopted pursuant to the Cocom agreement.

The report of the committee anticipates some of the obvious criticisms of this provision, and responds to them in advance. It notes, for example, that the GATT exempts actions taken for national security reasons. That is true. There is considerable ambiguity in the provisions of the GATT that are relevant, article XXI, but I believe that the United States would be on rather firm ground in GATT in this instance, if only because long practice in that organization gives almost complete discretion to each nation to determine what's in its own security interest.

The report also argues that this provision does not constitute the extraterritorial application of American law. That's a very complicated question. Strictly speaking, in the circumstances we are discussing with foreign exporter and foreign law, it would not be a violation of American law that would be penalized at all. It would be a violation of foreign law. That is a rather technical argument, however. From the foreign perspective, I'm sure that this provision looks like another example of extraterritoriality, as if the United States were attempting to enforce its own national security standards—or at least the multilateral standards the United States has pressured its allies to adopt—against wholly foreign firms with no jurisdictional connections to the United States, regardless of what the foreign government has chosen to do in the case.

In the end, I think the major problem with this provision is a political one rather than a legal one. The proposal comes hard on the heels of the bitterest dispute over extraterritoriality in the history of the export control program. It comes after years of irritation with the United States for enforcing reexport controls on top of foreign export controls, and on top of Cocom controls. It comes in the same bill that would require the President to negotiate with the member governments of Cocom with a view toward reaching agreement on better enforcement procedures, and otherwise strengthening the organization.

The contrast between the tone of that provision, calling for agreed strengthening of Cocom and the tone of the import control provision, under which the United States would essentially go it alone, could hardly be more stark.

Mr. Chairman, as to the foreign policy import control provisions, I feel even more strongly about that provision. I think it is seriously flawed. I would make four separate points about it.

First, I believe the Congress should act very cautiously indeed before granting the President any additional authority to impose economic sanctions of any kind. In my view, we have seen too many economic sanctions with the authority that the President already has, and this is a view widely held among persons who are not presently holding positions in government. The best way to proceed, it seems to me, would be to conduct a rather thorough and objective study of whether it's really necessary or desirable for the President to have a range of powers to impose different kinds of economic sanctions depending on the circumstances of a particular case. I don't think that that is necessary or desirable. But if it were concluded that it were, the thing to do would be to enact an appropriate statute giving the various powers with appropriate constraints on each power. The provision in the bill is a much less rational approach, and I'm sure that the necessary study and reflection have not taken place.

Second, although this provision is designed to give the President additional flexibility, it has two contrasting flaws on that score. In one sense, it doesn't go far enough. It only authorizes the President to restrict imports once he has already restricted exports. It thus unnecessarily limits Presidential flexibility. Furthermore, it could result in unnecessary burdens on exporters, because export controls might be imposed for the sole purpose of triggering the President's import control authority.

In another more important sense, the bill goes too far. I think this is the fundamental criticism of this provision. Once the President's authority to control imports were triggered by the imposition of an export control, any export control at all, even on one product to a particular country, under this bill there would be no constraint whatever on his use of that authority.

For example, the President would not be required to make a determination as to the likelihood that import controls would achieve their intended purpose. He would not be required to consider the economic effects of the import controls on U.S. importers. He would not be required to consult with Congress. All the carefully thought-out constraints in the statute, which Senator Heinz' committee has labored hard to make restrictive, simply do not apply to this authority.

If I could add just a couple more points, although the bell has gone off, I would add that the contract sanctity provision in this bill also does not apply to the import control authority. Thus, the President could freely interrupt existing import contracts under this authority, and could begin to do for the commercial reputation of American importers what the act has already done for the reputation of American exporters.

On the GATT argument, it's true that the United States is committed to a principle of nondiscrimination under the GATT. There are exceptions, including the national security exception we have already discussed. But there is no general exception for political trade controls. The Banking Committee report is noticeably silent on whether this import control provision is consistent with GATT.

The GATT problem—this goes to some of Senator Heinz' stimulating questions from before—the GATT problem may not always be as serious as it sounds, because it's true that the rules of the GATT only apply to trade between contracting parties. And many of the targets of American economic sanctions in recent years are not members of GATT. For example, the Soviet Union and most of the Warsaw Pact countries are not members. And the United States has suspended the application of GATT to those countries that are members. Libya is not a member, as the Senator pointed out, neither are Iran, Iraq, Syria or South Yemen. As to such states, GATT would simply not be a problem. One way to avoid the GATT problem entirely, in fact, would be to put into the statute the restriction that the import control authority could be used only against non-GATT members or countries to whom the United States does not apply the GATT rules.

Finally, I'm concerned, as others have been, that the import control authority in this bill could become a focus for industries in the United States seeking unwarranted protection from import competition. I think the last thing we need in the United States is another protectionist tool.

Thank you.

Senator **Danforth**. Thank you.

[The prepared statement of Prof. Kenneth W. Abbott follows:]

PREPARED STATEMENT OF PROF. KENNETH W. ABBOTT, VISITING PROFESSOR OF LAW, CORNELL UNIVERSITY LAW SCHOOL, ITHACA, N.Y.

Mr. Chairman, members of the Committee, my name is Kenneth Abbott. I am currently a visiting Professor of Law at Cornell Law School. My teaching and research are primarily in the area of international trade and business law, and I have spent considerable time studying issues relating to American political trade controls. I am here only out of interest in and concern for the subject, and I am not representing any other person or group.

I understand that this committee is concerned with three provisions of S.979: the two provisions of the bill that would authorize controls on imports, and the transfer of primary enforcement responsibility to the Customs Service. I do not feel qualified to speak on the proper assignment of enforcement responsibility, and I will leave that subject to those more familiar with the practical operations of the agencies involved. I do want to address both import provisions, however.

I find both of these provisions troubling, and I would hope that neither is adopted in its present form. I am in agreement with the arguments made by the Administration on these issues, but I will also make some additional points.

1. Section 9(7) of the Bill would amend section 11(c) of the Act to add an additional penalty for violation of national security controls: the violator could be subjected to whatever restrictions on importing goods or technology into the United States the President might prescribe.

If this provision were designed to apply only to American exporters violating American national security controls, there would not be a great deal to say about it. One might say that it was unnecessary, but its costs would probably not be high, and it might have some useful deterrent effect.

Under the Administration's proposal, and the provision in S.979, the import penalty would also be available against foreign firms that violate American extraterritorial export controls. Clearly the import penalty would be much more useful in this situation. This use of the penalty, however, raises the question of the propriety of American extraterritorial trade controls. I believe that extraterritorial controls have been applied more broadly than is wise, and that the aftermath of the pipeline episode is a particularly inappropriate time to impose new penalties for the violation of such controls. The question of extraterritoriality, however, is beyond the scope of this hearing.

The biggest problem with the import penalty is that, as the Banking Committee report makes clear, it is designed also to be applied against foreign firms that export foreign-origin goods in violation of foreign export control regulations, so long as the foreign regulations were issued pursuant to a multilateral agreement to which the United States is a party, in other words, the COCOM agreement.

The report anticipates some of the obvious criticisms of the provision and responds to them in advance. It notes, for example, that the GATT exempts actions taken for national security reasons. That is true. Of course, the drafters of article XXI of the GATT never had a provision like this in mind, and the language of article XXI is somewhat more ambiguous than the report suggests. Still, the United States would be on relatively firm ground in GATT, if only because article XXI, reinforced by long practice, gives almost complete discretion to each nation to determine what is in its own security interest.

The report also argues that the provision does not constitute the extraterritorial application of American law. That is a very complex question. Strictly speaking, in the circumstances we are discussing, it is not a violation of American law that would be penalized at all--it is a violation of foreign law. And the report goes even further, arguing in effect that under this provision the United States would not be enforcing any law at all: it would simply be exercising its sovereign right to close its borders to persons who had acted in ways harmful to its security.

From the foreign perspective, however, I am sure this provision looks like another example of extraterritoriality: as if the United States were attempting to enforce its own national security standards, or at least the multilateral standards the United States has pressured its allies to adopt, against foreign firms with no jurisdictional connection to the United States, regardless of what the foreign government has chosen to do. From this perspective, the argument that a denial of import privileges is not a penalty for a violation of law seems disingenuous: it certainly looks like a penalty, especially since the United States normally enforces its export control laws by a similar penalty, denial of export privileges.

In the end, I think the major problem with this provision is political. The proposal comes hard on the heels of the bitterest dispute over extraterritoriality in the history of the export control program. It comes after years of irritation with the United States for enforcing reexport controls on top of foreign export controls and on top of COCOM controls. And it comes in the same bill that requires the President to negotiate with the governments of the COCOM countries with a view toward improving enforcement procedures and otherwise strengthening the organization. The United States has already engaged in negotiations with its allies on strengthening COCOM and on East-West trade in general, and the Administration has indicated that it is pleased with the results.

Perhaps the thing to do would be to negotiate within COCOM for multilateral penalties as well as multilateral standards. If a violation of any nation's COCOM controls could be punished by a prohibition on selling to or buying from any COCOM member, that would be a truly powerful deterrent, and would not be the sort of unilateral usurpation of foreign authority that this provision might appear to be.

2. The other provision before this committee is section 6(1) of the Bill which would amend section 6(a)(1) of the Act. It would provide that, whenever the foreign policy export control authority conferred on the President by section 6 were exercised against a country, the President would be authorized to impose controls on imports from any firm in that same coun-

try. This provision is an improvement on the original version, which would have required the use of import controls, but I still believe that the provision is fundamentally flawed. I will make four separate points about it.

First, I believe that Congress should act very cautiously indeed before granting the President any additional authority to impose economic sanctions. In my view, we have seen too many economic sanctions with the authorities the President already has. This is a widely held view among persons not currently in government. A major aim of the import control provision is to spread some of the burden of economic sanctions from exporters to other groups. This is a laudable purpose. But I would be very cautious about addressing this problem through the enactment of new Presidential authorities.

The best way to proceed would be first to study carefully whether it is truly necessary or desirable for the President to be able to impose a range of economic sanctions, as he is authorized to do under the International Emergency Economic Powers Act, without congressional authorization. I do not believe that it is. If it were determined, however, that the President should have non-emergency authority to restrict imports, payments and other transactions, depending upon which sanction would be most appropriate in a particular case, then a suitable statute could be drafted, with appropriate constraints designed to minimize the costs to the United States of the various sanctions. The import control provision S.979, however, has been drafted without sufficient study and reflection.

Second, although an additional purpose of the provision is to give the President greater flexibility in foreign affairs, it has two contrasting flaws. In one sense it does not go far enough: it only authorizes the President to restrict imports once he has already restricted exports. It thus unnecessarily limits Presidential flexibility.

In another, more important sense, the bill goes too far: once the President's authority to control imports was triggered by the imposition of an export control, there would be no constraint whatever on the use of that authority. The President would not be required, for example, to make any determination as to the likelihood that the import controls would achieve their intended purpose. He would not be required to consider the effects of the controls on American importers, on consumers, on producers utilizing imported raw materials or components, or on inflation. He would not be required to consult with Congress. All the carefully thought out constraints in the statute, in fact, which the Banking Committee has been laboring hard to strengthen, would apply only to controls on exports. It would not be enough simply to make the existing criteria applicable to import controls as well; separate provisions would have to be drafted. This should not be difficult, however.

I might add that the contract sanctity provision in this bill would not apply to import controls either. Thus the President could interrupt existing import contracts, and could begin to do for the commercial reputation of American importers what the act has already done for the reputation of American exporters.

Third, under the GATT, the United States is committed to the principle of non-discrimination, usually known as the MFN principle. There are exceptions in the GATT, including the national security exceptions discussed above, but there is no general exception for political trade controls. The Banking Committee Report is noticeably silent on whether this import control provision is consistent with GATT.

The same GATT rules actually apply to exports as well as imports. In the past, however, GATT has refused to deal with political export controls, treating them as beyond the competence of the organization. Traditionally, however, GATT has been primarily concerned with restrictions on imports. Political import controls, then, are more likely to run afoul of the GATT, with the possibility of foreign retaliation, or at least to become the subject of international criticism on legal and policy grounds. In any case, disregard of the non-discrimination principle weakens the principle generally, and may return to haunt the United States in the future.

The GATT problem would not always be a serious one. The rules of GATT only apply to trade between contracting parties, and many of the recent targets of American economic sanctions are not members of GATT. The Soviet Union and most Warsaw Pact countries are not members, and the United States has suspended the application of GATT to those that are. Libya is not a GATT member, and neither are Iran, Iraq, Syria or South Yemen. As to such states, GATT would not be a problem.

One way to avoid the GATT problem entirely, in fact, would be to provide in the statute that import controls could only be imposed against non-GATT members or countries to which the United States does not apply the rules of GATT. Some further research would have to be done in the Department of State to determine if there are other treaties or international agreements that should be protected under the statute.

Finally, I am concerned that the import control authority in this bill could become a focus for industries in the United States seeking unwarranted protection from import competition. Again, the lack of constraints on the President's authority becomes an issue. For example, it appears that if the President were to control exports of a single product--let us say certain vehicles--to Argentina, for example, in the interest of regional stability, he would automatically be authorized to restrict any and all imports from that country. Domestic producers in the United States might well seize on this opportunity to press for controls on competing products.

Oddly enough, the import control provision could result in unnecessary burdens on exporters. Since the President would be authorized to control imports only after a foreign policy export control had been imposed, domestic groups seeking import controls would have an incentive to pressure the Administration to impose at least some restrictions on exports. As Senator Danforth has phrased it, this provision might create "enormous new constituencies" for the use of the Export Administration Act.

This concludes my testimony. I appreciate the opportunity to state my views on the import control provisions of S.979.

STATEMENT OF BERNARD STEINWEG, SENIOR VICE PRESIDENT, CONTINENTAL GRAIN CO., APPEARING AS CHAIRMAN OF THE INTERNATIONAL TRADE COMMITTEE, NATIONAL GRAIN & FEED ASSOCIATION

Senator DANFORTH. Mr. Steinweg.

Mr. STEINWEG. Thank you, Mr. Chairman. My name is Bernard Steinweg. I'm a senior vice president with Continental Grain Co. in New York, and today I'm representing the National Grain & Feed Association, of whose international trade committee, I am chairman.

Matters pertaining to trade policy are of much interest to members of our association, as they are to all people of agriculture. And, therefore, we appreciate the opportunity to participate in these hearings.

I also wish to express our association's general support of the Senate version of the legislation to renew the Export Administration Act. The importance of agricultural exports and our intent to meet our trade commitments are clearly defined therein.

But these hearings concern import provisions, and, therefore, import policy, an area sometimes overlooked and receiving only secondary consideration in agricultural circles. Greater attention has been paid to the import restrictions and export practices of others. At the same time, there has been an increasing trend in our country toward restrictive import policy, toward protectionism, which has already adversely affected our grain exports.

On the surface and in isolation, the intent of the provisions being addressed here would not warrant apprehension by agriculture. But today any proposal or action that can be interpreted by our trading partners as another trade restriction is the source of potential retaliation. This is the area of real concern. The dispute over quotas on textile imports from China is, by now, a well-publicized example. For months, access to this important grain importing country was denied us. Hopefully, the negotiations of last week of a new 5-year quota will allow normal grain trade to resume. We say hopefully because we know of at least one other trade dispute with China. That one, concerning mushroom quotas, is at a minimum a source of irritation to the Chinese and could still develop into a larger problem.

China's reentry into international trade has been cautious and pragmatic. They have kept an even balance of trade. They have not assumed huge burdens of debt. It is understandable that they will maximize their imports from those countries providing them with an outlet for their goods.

Our import practices are part of a comprehensive trade policy. It is the committee—this is the committee that has jurisdiction over our import practices so it seems appropriate that the record reflect the concern of agricultural interests, not only for contract sanctity, but also for a coherent import policy.

Trade implies exchange of goods or services. A two-way street which depends on those wanting to import having the means to pay, which they can only generate through exports of their own. Without the willingness and ability of countries to do both, trade will quickly diminish.

Ideally, each country should produce and export that which it is able to do most efficiently. And import from others items which can be produced more cheaply elsewhere. We know, of course, this does not happen. For political reasons, most countries will try to attain a certain degree of self-sufficiency in food or energy or other essential materials. This can be accomplished through the imposition of artificially high incentives. And, then, too, as the relative advantages of countries to produce specific goods or services and export them change, adjustments are often required in other countries to accommodate such developments.

When such adjustments are too difficult for business or labor, they are strongly resisted. Restrictions such as duties and quotas or other barriers are imposed. In our own country, we have witnessed a dramatic population shift from the farm to urban areas over the past 40 years. Technology and capital inputs replace labor on our farms, while at the same time our industries could absorb additions to the labor force. Today we see a similar situation in Japan, Taiwan, South Korea, countries which have attracted workers from agriculture to industry. And, thus, have increased imports of agricultural products; particularly, grain and soybeans.

The enormous expansion of the economies of the world since World War II has been credited to the growth of international trade. And the growth of this trade is directly attributable to a more open trading system and support for those institutions and organizations which have aided in the move toward freer trade.

It is ironic and sad that in the current period of economic recession the trend in trade policy is away from the successful direction of the post-War era, and resembles more the restrictive policies of the 1930's, which proved so disastrous. No wonder, then, that charges and countercharges of unfair trade practices are now an everyday occurrence and retaliation a common threat or accomplished fact.

Solutions to current economic ills will not come easily or quickly. We continue to believe that a free and open trading policy offers the best and only chance of success. We recently testified that export subsidies were not the answer to current agricultural problems. We, therefore, find it consistent to oppose those restrictive import policies that invite retaliation against our agricultural exports.

Textiles or steel quotas, domestic content provisions for orders, and even our in-agriculture, our GATT-grandfathered protection of dairy, cotton, sugar, and peanut imports are not in the interest of promoting exports of those items which we produce with comparative advantage.

Retaliation of our own to unfair practices is a strategy; not a policy. While much of our attention and concern over export subsidies and trade issues has been focused on the EEC in Japan, we are reminded that the developing countries now take close to 40 percent of U.S. exports. They must have the ability to pay if they are to import. They must be able to export if they are to generate foreign exchange. Aid and credit programs are vital adjuncts to export policy; not substitutes for a willingness to open trade doors.

The Caribbean Basin Initiative is an example of positive action in this area.

Senator, I appreciate your time, and that of the members of the subcommittee, and your attention this morning; particularly, since I may have strayed from the specific items requested.

Senator **Danforth**. Thank you.

STATEMENT OF EUGENE J. MILOSH, EXECUTIVE VICE PRESIDENT OF THE AMERICAN ASSOCIATION OF EXPORTERS AND IMPORTERS, NEW YORK, N.Y.

Senator **Danforth**. Mr. Milosh.

Mr. **Milosh**. Mr. Chairman, I'm Gene Milosh, executive vice president of the American Association of Exporters and Importers. With me are Suzi Evalenko, association director of export activities, and Terence Murphy of the law firm of McDermott, Will & Emery. Mr. Murphy is also chairman of AAEI's export controls group, a working committee of some 100 companies exporting broadline consumer goods, agricultural products, capital goods, and high technology hardware and software, as well as services.

With 1,400 U.S. company members nationwide, AAEI is the only organization in the country specifically representing the interests of exporters and importers. AAEI is pleased to have this opportunity to share our thoughts and recommendations on proposed revisions of the Export Administration Act now before this subcommittee.

As an organization dedicated to the expansion of freer trade worldwide, AAEI believes that export controls must be imposed carefully so as not to diminish efforts at home and abroad to achieve export expansion, trade liberalization, and international cooperation.

We wish to focus our testimony on the import controls provisions of S. 979 set forth in a proposed amendment to section 6(a) of the Export Administration Act and in proposed new section 11(c)(4).

The amendment to section 6(a) of the act, authorizing the President to impose import controls against a country with respect to which he has imposed export controls for foreign policy reasons, raises both serious economic questions and concerns about our international obligations.

In appropriate circumstances, the President has authority to embargo trade under the International Economic Emergency Powers Act. We believe that further authority under the Export Administration Act is neither necessary nor desirable.

AAEI believes that two considerations should be seriously weighed before embarking on such a course: First, we reject the assumption that if you ban imports, you hurt only the target country, not our own. We would argue that this is not the case, especially as it must be anticipated that a U.S. import embargo would result in similar retaliatory action by the target country. Indeed, were the shoe on the other foot, our own law—section 301 of the 1974 Trade Act—would permit the President to take retaliatory action, and I quote, "to respond to any act, policy or practice of a foreign country," that is, "Unjustifiable, unreasonable or discriminatory and burdens or restricts United States commerce."

Beyond the question of economics and the mutual injury caused by restricted trade, is a broader question of international obligation. Let us suppose, for example, that at some future date a foreign policy sanction were used against a trading partner that is a signatory of the GATT or one which the United States has a treaty of Friendship, Commerce and Navigation. If an import ban were imposed in tandem with the foreign policy sanction, we believe the United States might well be violating its international trade obligations.

We would suggest that the very threat of such a future occurrence may be injurious to American efforts to strengthen and expand present international trade agreements to enhance the competitiveness of American exports. Certainly, we learned from last year's Siberian gas pipeline case that American exporters' reputation for reliability was one casualty of that dispute within the Atlantic Alliance.

Section 11(c)(4).

With reference to section 11(c)(4), we also have serious legal and policy reservations about the proposed grant of authority to the President to punish whoever violates United States—or multilaterally agreed-upon—national security export controls by forbidding such a violator to import goods or technology into the United States.

Import controls in the form of antidumping or countervailing duties under the Trade Agreements Act of 1979, various forms of import relief under the escape clause—section 201 of the Trade Act of 1974—or exclusion orders under section 337 of the Tariff Act of 1930 are traditional tools available to protect a domestic industry from injury caused by a particular import.

A separate statute, section 406 of the 1974 Trade Act, provides import relief from "market disruption" with respect to imports from Communist countries.

These statutes, however, are fundamentally economic in nature even if policy oriented to some degree. Import controls may not be imposed without a showing of actual or threatened economic injury to a domestic industry, and without causation findings by the International Trade Commission, a regulatory agency independent of the executive branch.

Even authority—provided in section 232 of the Trade Expansion Act of 1962—to adjust the imports of an article, so such imports will not threaten the national security, requires findings of injurious impact on a domestic industry.

These tools are recognized in multilateral trade agreements like the GATT and are permitted under particular circumstances when their need can be documented. In our judgment, the proposed import controls in section 11(c)(4) would not qualify as one of the Security Exceptions under article XXI of the GATT.

We believe that section 11(c)(4), if enacted, would create serious potential for pressure upon the President from domestic interest wishing to exclude or limit imports—or to make them more expensive—without going through the usual fact-finding and review processes.

As we read the amendment, the President not only would be authorized to control—that is to bar—imports of the goods or technology exported, or reexported, in violation of section 5 of the act—or of Cocom controls—but he could also bar any or all imports into the United States by violating person, wherever originating. This is a formula for abuse.

AAEI supports effective enforcement of the export controls laws. We support the continuing effort by the Government to strengthen multilateral agreement to control exports which pose a threat to our national security.

But, because inclusion of a person's product or technology on the Cocom list could subject that person to a total U.S. import ban on all of its products or technology, in the event of a violation, our Cocom partners would have a strong incentive to withhold their consent to the inclusion of their nation's goods or technology on the Cocom list.

We believe that unilateral punitive import restrictions authorized by the proposed new section 11(c)(4) are counterproductive to that larger effort.

In the interest of time, we will not present here our concerns in the area of enforcement powers. We have addressed this matter in our prepared statement, which has been made available to the members of the subcommittee, and would ask that our statement be included in the record.

We thank the subcommittee for the opportunity to share our thoughts with you, and would be pleased to answer any questions.

Senator DANFORTH. Thank you.

[The prepared statement of Mr. Milosh follows:]

PREPARED STATEMENT OF EUGENE J. MILOSH, EXECUTIVE VICE PRESIDENT, AAEI, ON BEHALF OF THE AMERICAN ASSOCIATION OF EXPORTERS AND IMPORTERS

Good day, Mr. Chairman, members of the Subcommittee. My name is Eugene Milosh, I am Executive Vice President of the American Association of Exporters and Importers (AAEI). With me today are Suzi Evalenko, Association Director of Export Activities and Terence Murphy, of the Association-member law firm of McDermott, Will & Emery. Mr. Murphy is also the Chairman of AAEI's Export Controls Group, a working committee of some 100 companies exporting broad line consumer goods, agricultural products, capital goods and high technology hardware and software, as well as service businesses.

With 1400 U.S.-company members nationwide, AAEI is the only organization in the country specifically representing the interests of exporters and importers.

AAEI is pleased to have this opportunity to share our thoughts and recommendations on proposed revisions of the Export Administration Act, now before this Subcommittee for your consideration.

As an organization dedicated to the expansion of freer trade worldwide, AAEI believes that export controls must be imposed carefully so as not to diminish U.S. efforts at home and abroad to achieve export expansion, trade liberalization and international cooperation.

With the Subcommittee's permission, we wish to focus our testimony on the "import controls" provisions of S. 979, set forth in a proposed amendment to Section 6(a) of the Export Administration Act and in proposed new Section 11(c)(4).

Section 6(a). The amendment to Section 6(a) of the Act, authorizing the President to impose import controls against a country with respect to which he has imposed export controls for foreign policy reasons, raises both serious economic questions and concerns about our international obligations.

We note that in appropriate circumstances, the President has authority to embargo trade under the International Economic Emergency Powers Act. We believe that further authority, under the Export Administration Act, is neither necessary nor desirable.

AAEI believes that two considerations should be seriously weighed before embarking on such a course:

First, we reject the mercantilist assumption that if you ban imports, you hurt only the target country, not our own. We would argue that this is not the case, especially as it must be anticipated that a U.S. import embargo would result in similar retaliatory action by the target country. Indeed, were the shoe on the other foot, our own law — Section 301 of the 1974 Trade Act — would permit the President to take retaliatory action, and I quote, "to respond to any act, policy or practice of a foreign country" that is, I quote again, "unjustifiable, unreasonable or discriminatory and burdens or restricts U.S. commerce."

Beyond the question of economics (and the mutual injury caused by restricted trade), is a broader question of international obligations.

This amendment does not specify particular countries the imports from which could be restricted or prohibited for foreign policy purposes. Let us suppose, for example, that at some future date a foreign policy sanction were used against a trading partner that is a signatory of the General Agreement on Tariffs and Trade (the GATT), or one with which the U.S. has a treaty of Friendship, Commerce and Navigation. Let us further assume that an import ban were imposed in tandem with the foreign policy sanction. If such an import ban went into effect, we believe the United States might well be in the position of violating its international trade obligations.

We suggest that the very threat of such a future occurrence may be injurious to American efforts to strengthen and expand present international trade agreements to enhance the competitiveness of American exports. Certainly we learned in last year's Siberian gas pipeline case that American Exporters' reputation for reliability was one casualty of that dispute within the Atlantic Alliance.

Section 11(c)(4). We also have serious legal and policy reservations about the proposed grant of authority to the President to punish whoever violates United States — or multilaterally agreed-upon — national security export controls, by forbidding such violator to import goods or technology into the United States.

Presumably the latter category of controls is intended to refer to the so-called COCOM controls maintained by the United States and our NATO allies (except Iceland and Spain), plus Japan.

"Import controls" in the form of antidumping or countervailing duties under the Trade Agreements Act of 1979, various forms of import relief under the "escape clause" (Section 201 of the Trade Act of 1974), or exclusion orders under Section 337 of the Tariff Act of 1930, are traditional tools available to protect a domestic industry from injury caused by a particular import. A separate statute -- Section 406 of the 1974 Trade Act — provides import relief from "market disruption" with respect to imports from Communist countries.

These statutes, however, are fundamentally economic in nature, even if "policy oriented" to some degree; import "controls" may not be imposed without a showing of actual or threatened economic injury to a domestic industry, and without "causation" findings by the International Trade Commission, a regulatory agency independent of the Executive Branch. Even authority (provided in Section 232 of the Trade Expansion Act of 1962) to adjust the imports of an article so such imports will not threaten the national security requires findings of injurious impact on a domestic industry.

These tools are recognized in multilateral trade agreements (like the GATT) and permitted under particular circumstances when their need can be documented. In our judgement, the proposed "import controls" in Section 11(c)(4) would not qualify as one of the "Security Exceptions" under Article XXI of the GATT.

We believe that the amendment to Section 11(c)(4), if enacted, would create serious potential for pressure upon the President from domestic interests wishing to exclude or limit imports (or to make them more expensive) without going through the usual fact-finding and review processes. As we read the amendment, the President would be authorized to "control" (i.e. to bar) not only imports of the goods or technology exported, or re-exported, in violation of Section 5 of the Act (or of COCOM controls) but also to bar any or all imports into the United States by the violating person, wherever originating. This is a formula for abuse.

AAEI supports effective enforcement of the export controls laws. We support the continuing effort by the Government to strengthen multilateral agreement to control exports which pose a threat to our mutual national security.

But, because inclusion of a person's product or technology on the COCOM list could subject that person to a total U.S. import ban on all of its products or technology, in the event of a violation, our COCOM partners would have a strong incentive to withhold their consent to the inclusion of their nation's goods or technology on the COCOM list.

We believe, that unilateral punitive import restrictions authorized by the proposed Section 11(c)(4) are counterproductive to that larger effort.

In addition to our policy and legal reservations about this amendment, it is unclear who would be covered. The amendment does not make clear whether the forbidden goods are limited to imports from a foreign violating company to any recipient in the U.S., or whether they include any goods, of whatever origin, imported by a violating company in the United States.

If it can be read both ways, we would question whether such a general import ban could reasonably be administered. We note that very often persons acquiring imports are not themselves the "importer of record." Presently, there is no U.S. licensing system for imports in which the end user is identified. An attempt to monitor the transfer of all imports to a given company would entail a nightmare of paperwork for importers who have not violated any law.

As regards the third area under review by this Subcommittee, the enforcement section of S. 979 provides powers for enforcement agents to search, seize and arrest property and persons without warrant upon a standard of "reasonable cause to suspect" a violation has occurred or is about to. We believe that such actions, based upon mere suspicion, are likely to result in abuse and are of dubious constitutionality. They therefore run the risk of being rejected by the courts if used as the basis for a criminal case. We would not wish to see violators get away scot free. Would it not be better to amend the language of the statute to assure that cases which should be won by the government are not lost on constitutional grounds? To preclude such occurrence, AAEI, recommends that the clearly constitutional standard of "probable cause to believe" be adopted in place of "reasonable cause to suspect". We suggest the following amending language to accomplish this:

Sec. 12.(a) General Authority

(2) An officer of the United States Customs Service of the Department of the Treasury or other person authorized to board or search vessels who has ~~reasonable~~ probable cause to ~~suspect~~ believe that any goods or technology have been or will be exported from the United States in violation of any Act governing exports, may,

(A) stop, search and examine, within or without his district, such vehicle, vessel, aircraft, or person on which or whom he has ~~reasonable~~ probable cause to ~~suspect~~ believe there are any such goods or technology, whether by the person in possession or charge or by, in, or upon such vehicle, vessel or aircraft, or otherwise;

(B) search, wherever found, any package or container in which he has ~~reasonable~~ probable cause to ~~suspect~~ believe there are any such goods or technology;

(C) seize and secure for trial any such goods or technology on or about such vehicle, vessel, aircraft or person, or in such package or container.

(3) (A) An officer of the United States Customs Service of the Department of the Treasury or other person authorized to board or search vessels may, while in the performance of, and in connection with, those official duties, make arrests without warrant in the enforcement of the provisions of any Act governing exports. The arrest authority conferred by this subsection is in addition to any arrest authority under other laws.

(B) if such officer or person has ~~reasonable~~ probable cause to ~~suspect~~ believe that any goods or technology have or would have been exported from the United States in violation of any Act governing exports, the officer or person shall refer such matter to the Secretary of the Treasury, or his designee, or the Attorney General for civil or criminal action, respectively, in accordance with this section.

Senator **Danforth**. I think that there are a couple of key points to be made. The first is that it has been generally thought that the protectionism is just a general principle detrimental to exporting because other countries retaliate. In this case, I think Mr. Abbott made this point and it is directly detrimental to exporting because prohibitions on exports under this bill are a condition precedent to prohibition on imports.

Professor **Abbott**. Under section 6, right.

Senator **Danforth**. That's correct. So an advocate for import controls, say a company that was threatened by imports and felt that we should help it and at the same time serve foreign policy goals, would have to advocate not only limitations on imports but before getting to the limitation on imports would have to be an aggressive advocate for the limitation on exports.

Professor **Abbott**. An enormous new constituency, in fact.

Senator **Danforth**. Pardon?

Professor **Abbott**. An enormous new constituency, in fact.

Senator **Danforth**. It would be a new constituency. And I think a second point is that right now if a President wanted to impose import controls against a country or against a product, the President could always come to the Congress and ask for import controls. It might violate GATT, but at least Congress could do it. What this bill does is provide for a general delegation of authority. Is that correct, Mr. Abbott?

Professor **Abbott**. Yes. And a much more general delegation of authority than Congress has seen fit to give the President on the export side for many years. No constraints whatsoever. I think—I don't know if it's an oversight or a matter of draftsmanship or if it is intended to be that way, but I can't see how Congress would be willing to give that unconstrained authority on the import side when it has such careful restrictions on the export side.

Senator **Danforth**. Mr. Steinweg, Senator Dole in his comments said that in his view farmers may have been asleep at the switch on this bill. Do you think that's correct? Do you think there is a need for farm groups to focus more attention on this?

Mr. **Steinweg**. That's one of the reasons we are here. And there is no doubt that more focus has been paid on matters pertaining to exports, the contract sanctity issues, than the import matters. But as I pointed out in my testimony, I think problems such as we have just been having for the past months with China, I think, will certainly alert all of our industry.

Senator **Danforth**. And, Mr. Milosh, you represent both exporters and importers. This bill could exacerbate the conflict between them rather than lead to greater cooperation, could it not?

Mr. **Milosh**. We would certainly agree to that comment. We would also add that as far as our multilateral relations are concerned, we don't see that import controls could help in any way in the effort to get our Cocom partners to tighten their export controls. If anything, as we have described in our testimony, efforts to improve the Cocom list are likely to be thwarted by unilateral U.S. import controls on foreign products.

Senator **Danforth**. Thank you all very much for being here this morning. Thank you for your patience in waiting so long.

Now Ms. Pilon is not here today. She had to cancel her appearance. But Mr. Mack is. And he is the next witness.

STATEMENT OF JAMES H. MACK, PUBLIC AFFAIRS DIRECTOR, NATIONAL MACHINE TOOL BUILDERS' ASSOCIATION, McLEAN, VA.

Mr. MACK. Thank you, Mr. Chairman.

I'm going to confine my comments this morning to the provisions in S. 979 which authorize the President to deny a violator of multilateral national security export controls to which the United States is a party the privilege of importing goods or technology into the United States.

The National Machine Tool Builders Association believes that S. 979, taken as a whole, strikes a very delicate balance between two compelling interests. The need to expand American exports on the one hand, and the need to maintain the national security of the United States on the other, consequently, S. 979 is as much a defense bill as it is a trade measure.

The Export Administration Act provides the legislative authority for the control of U.S. exports for national security, foreign policy, or short supply purposes. S. 979 contains a number of reforms designed to reduce the burdensome paperwork and other delays which have too long pervaded the export licensing process. Specifically, S. 979 reforms the Export Administration Act's national security control provision by removing validated license requirements and providing for shipment under a general license of nonmilitarily critical technology to the Cocom countries. It also provides for a new comprehensive operations license for transfers by U.S. companies to their Western subsidiaries and licensees and to other specific end-users in the Cocom countries.

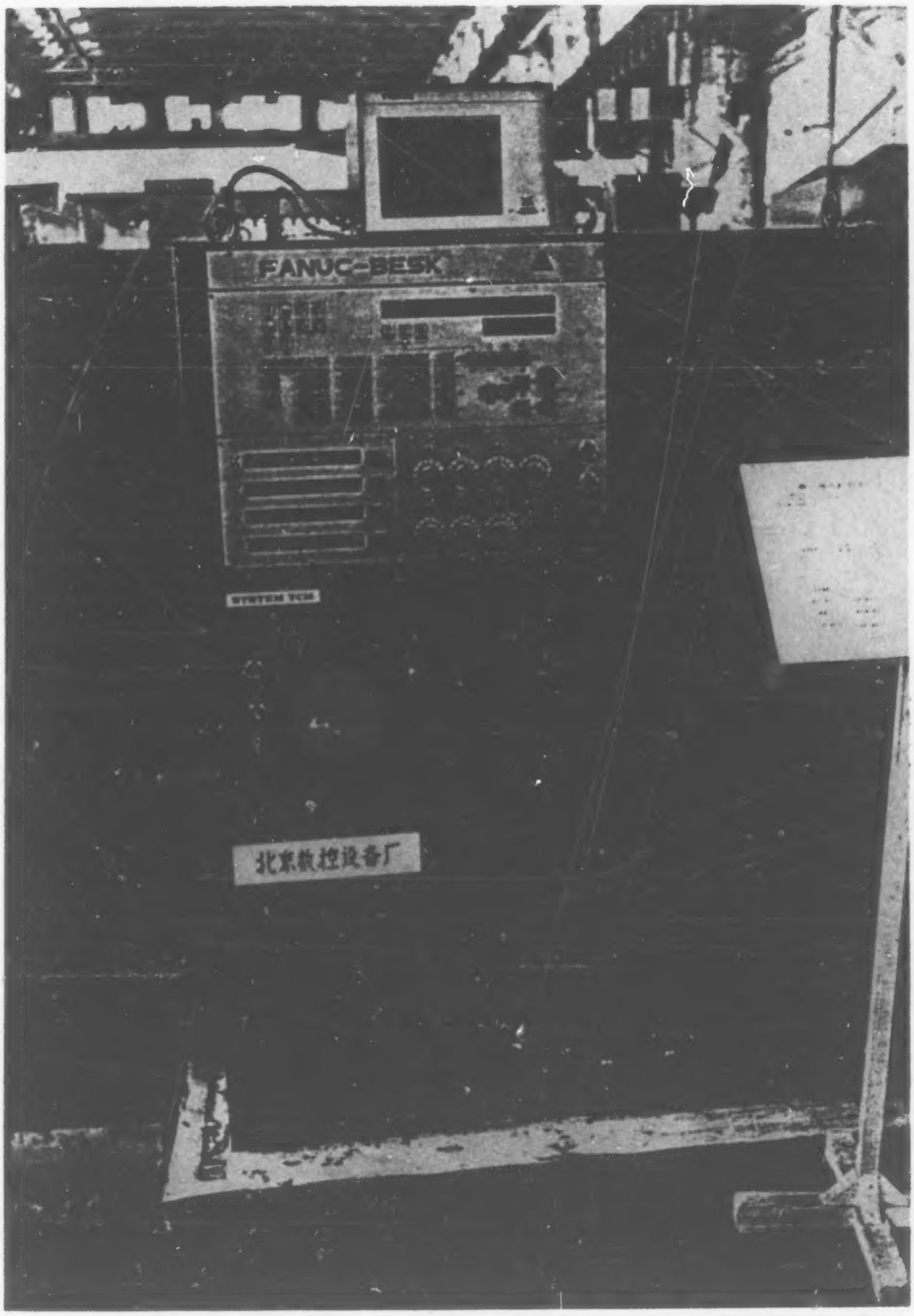
These provisions were adopted by the Banking Committee after considerable discussion and controversy. We commend Senators Garn and Heinz for their success in reaching an effective and workable compromise.

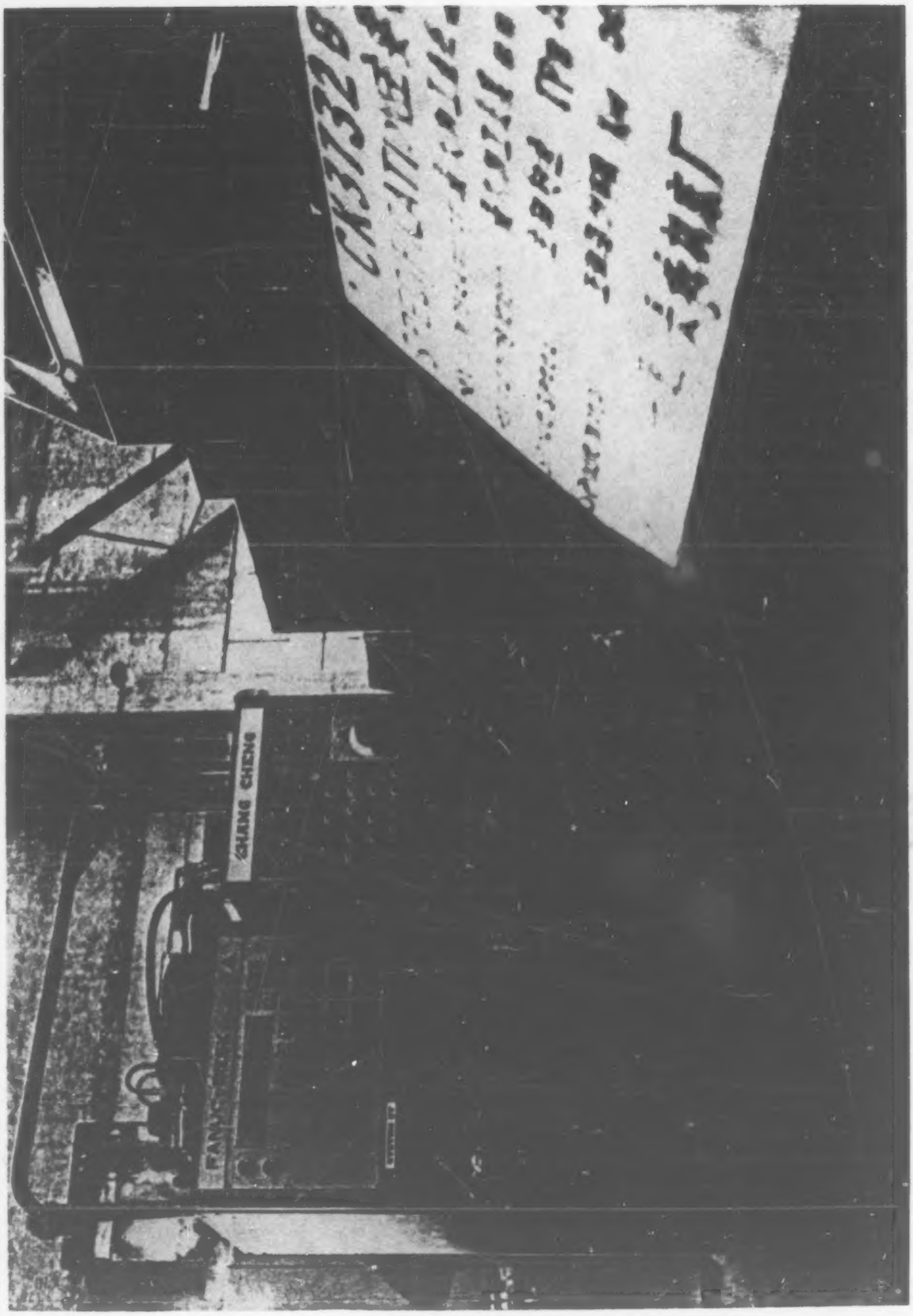
However, we recognize that one of the risks of enacting these reforms is the possibility that through certain of our Cocom allies, militarily critical goods, and technology could be diverted to our potential adversaries in clear violation of multilateral proscriptions.

The import control provision is thus regarded by some as an essential element of the compromise—in effect, the glue that holds these reforms together. NMTBA understands and is sympathetic with this viewpoint. In fact, it is the only provision in S. 979 which directly addresses the problem of assuring compliance by our allies with the Cocom regulations. As such, it is aimed at reinforcing Cocom's effectiveness.

Our written statement illustrates the need for the national security import control provision vis-a-vis the machine tool industry, an industry which manufactures highly defense sensitive equipment and technology that is routinely subject to national security export controls. Many of these controls are maintained on an allegedly multilateral basis through Cocom. Suffice it to say, however, that while the United States honors the system religiously, many of our allies honor it only when it suits them to do so. And the result, as our written statement indicates, is a leakage of militarily critical items to the Soviet Union and other potential adversaries.

I've got some pictures that show Soviet machine tool equipped with a Japanese multiaxis control in clear violation of Cocom. I also have pictures of Chinese multiaxis controls, licensed to the PRC by a Japanese firm, again in clear violation of Cocom.


FANUC-BESK
SYSTEM 7CM
北京数控设备厂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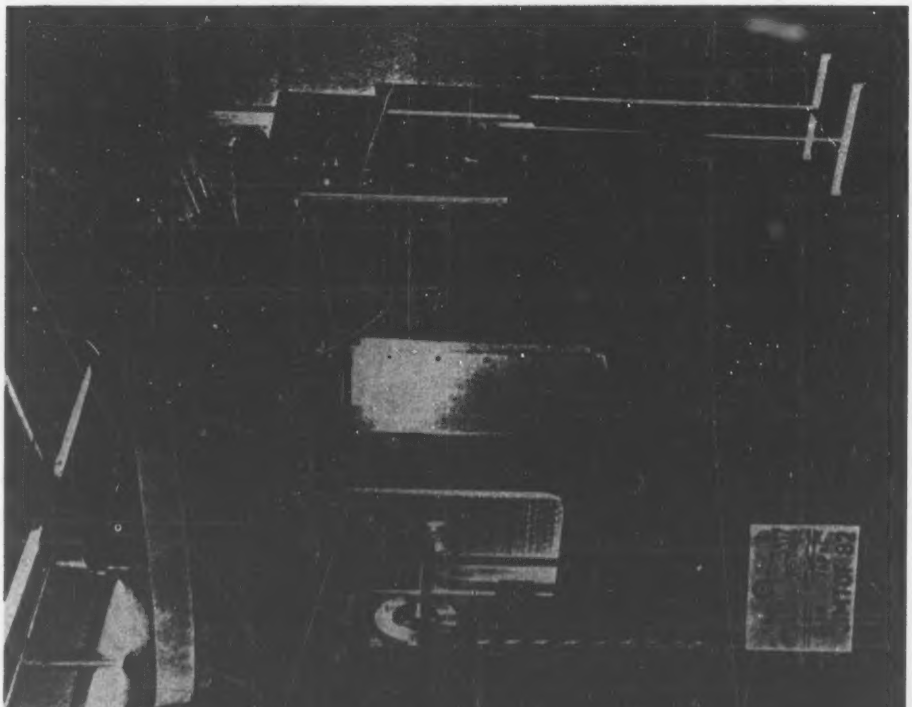
SHANG CHENG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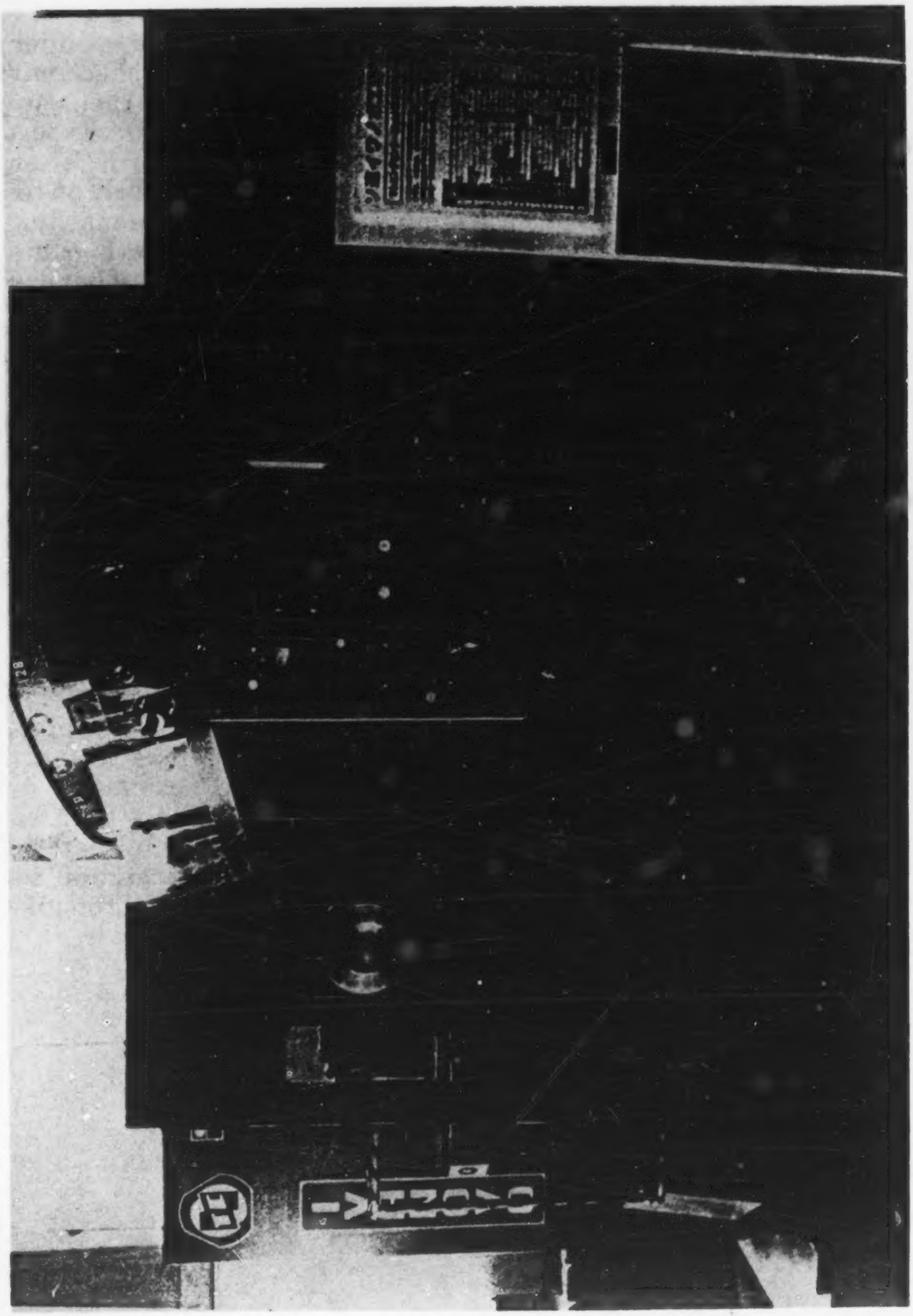

Approximately 25 percent of the world market, about half of the market outside the United States, for machine tools lies in the Communist countries. In 1981, the Soviet Union imported 1 billion dollars' worth of machine tools. The United States supplied only $17 million of that market. U.S. machine tool builders, then, are effectively denied access to about half of their potential export market. But comparable equipment, manufactured by other Cocom members, enters the Communist countries in clear violation of Cocom regulations. In 1981, for example, 88 percent of the machine tools going into the Soviet Union came from our Western Allies and fellow Cocom members. The U.S. share accounted for about 1½ percent.

When the United States complies with Cocom regulations, but our allies do not, export controls actually work to the detriment of the security of the free world in two ways. First of all, Communist bloc access to militarily critical items is not denied. And, second, our own critical industrial base is imperiled because the economies of scale utilized by our Cocom violating competitors allow them not only to capitalize on the export market, but to flood our domestic market with imports as well.

NMTBA believes that the national security import control provision goes to the very core of the compromise represented by S. 979. We join with the Banking Committee in hoping that both our Government's efforts and the efforts of Cocom to achieve adequate enforcement of multilateral agreements will be successful, thereby making the imposition of import controls unnecessary. However, we believe that the threat of their imposition may well be the only effective tool to insure that this is so. Experience has taught us that simple persuasion and endless negotiations have not been effective in assuring multilateral compliance with the multilateral agreements to control exports for the protection of the mutual security of the Western alliance. That's why we urge the subcommittee to support this crucial safeguard.

Thank you.

[The prepared statement of Mr. Mack follows:]

STATEMENT BY
JAMES H. MACK
PUBLIC AFFAIRS DIRECTOR
ONAL MACHINE TOOL BUILDERS' ASSOCIATION
BEFORE THE
SUBCOMMITTEE ON INTERNATIONAL TRADE
COMMITTEE ON FINANCE
UNITED STATES SENATE
AUGUST 4, 1983

I. INTRODUCTION

Good morning, my name is James H. Mack. I am Public Affairs Director of the National Machine Tool Builders' Association (NMTBA), a national trade association comprised of more than 287 member companies which account for nearly 90% of United States machine tool production. Our members make machinery which cuts, shapes or forms metal.

Mr. Chairman, we appreciate this opportunity to express our views concerning S. 979, the Export Administration Act Amendments of 1983 -- legislation which, as you know, has direct and very substantial impact on the U.S. machine tool industry. At the Subcommittee's request, we will confine our comments this morning to the provision in S. 979 which authorizes the President to deny a violator of a multilateral national security export controls agreement, to which the United States is a party, the privilege of importing goods or technology into the United States (Sec. 11(c)(4) of S. 979). The importance of this provision can best be appreciated when viewed within the overall context of S. 979.

NMTBA believes that this legislation strikes a very delicate balance between two compelling interests: the need to expand American exports on the one hand and the need to maintain the national security of the United States on the other. Consequently, S. 979 is as much a defense bill as it is a trade measure.

The Export Administration Act provides the legislative authority for the control of U.S. exports for national security, foreign policy, or short supply purposes. Every export from the United States requires a license. However, most exports are made under a general license, which the exporter, in effect, issues to himself. Items which appear on the Commodity Control List require a validated license, which is obtainable upon application to the Department of Commerce. In the case of national security controls, the Commerce Department is required to submit license applications for exports destined for Communist countries to the Department of Defense and various other agencies. For all practical purposes, the Department of Defense effectively has a veto over the granting of all validated licenses to Communist destinations.

The Commodity Control List is composed of approximately 100,000 items appearing under about 200 broad categories. In recent times, the number of applications for validated licenses to all destinations has been between 75,000 and 80,000 per year. At times, the vast number of validated license applications over-burdens the limited number of qualified licensing personnel, and the system simply breaks down -- causing substantial delays and excessive paperwork.

Prior to 1979, the last time Congress reauthorized the Export Administration Act, our members and other persons in the business community registered complaints about the horrendous delays accompanying the interagency licensing process. Our members reported to us that they had experienced delays of up to two years in the granting of export licenses. Needless to say, many orders were cancelled prior to the granting of U.S. export licenses. The Export Administration Act Amendments of 1979 imposed time limits within which the bureaucracy must process validated license applications.

Notwithstanding the substantial reforms achieved in 1979; and notwithstanding significant improvements in the processing of export licenses by the current Administration; export controls continue to be a major impediment to U.S. export competitiveness.

There seems to be general agreement -- even from those whose principle concern is the prevention of the transfer of militarily critical technology transfers to our potential adversaries -- that the Commodity Control List is simply too large and the number of applications is too unwieldy. The great preponderance of export license applications are routinely (albeit, too slowly) approved.

Some items on the Commodity Control List are presumably controlled in concert by the United States and its Western allies through an informal arrangement known as COCOM. This organization, which is headquartered in a suite of rooms in the basement of the annex of the U.S. Embassy in Paris, consists of the NATO countries (minus Iceland) plus Japan. In addition, the United States has bilateral export control agreements with Australia and New Zealand. An application for a validated export license for items appearing on the COCOM list must be first approved by the exporter's licensing authorities and then submitted to COCOM for unanimous approval by the U.S. and its allies. The U.S. honors the system religiously, while many of our allies honor it only when it suits them to do so.[1]

Items which appear on the U.S. Commodity Control List but not on the COCOM list are controlled unilaterally by the United States. The Export Administration Act reauthorization currently pending in the House of Representatives provides for the systematic removal of many of these unilaterally controlled items from the Commodity Control List. This is one way to reduce the unwieldy number of validated license applications. S. 979 does not contain a similar provision.

The Senate Banking Committee (as well as the House Foreign Affairs Committee) chose a second way to reduce the number of validated license applications. S. 979 reforms the Export Administration Act by removing validated license requirements (and providing for shipment under a general license) of non-militarily critical technology to the COCOM countries. It also provides for a new comprehensive operations license for transfers by U.S. companies to their Western subsidaries and licensees and to other specific end-users in the COCOM countries.

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[1] For the most part, all machine tools controlled for national security purposes appear on the COCOM list, which, together with a very stringent interpretation of various administrative notes, is incorporated into the Commodity Control List.

These provisions were adopted by the Banking Committee after considerable discussion and controversy. We commend Senators Garn and Heinz for their success in reaching an effective and workable compromise. We are confident that these reforms will result in a substantial reduction in the burdensome paperwork and other delays which have too long pervaded the export process.

However, we recognize that one of the risks of enacting these reforms is the possibility that through certain of our COCOM allies, militarily critical goods and technology could be diverted to our potential adversaries in clear violation of multilateral proscriptions. The import control provision is thus regarded by some as essential element of the compromise -- in effect, the "glue" that holds these reforms together. NMTBA understands and is sympathetic with this viewpoint. In fact, it is the only provision in S. 979 which directly addresses the problem of assuring compliance by our allies with the COCOM regulations. As such, it is aimed at reinforcing COCOM's effectiveness.

II. THE NEED FOR NATIONAL SECURITY IMPORT CONTROLS

Machine tools have long been recognized as essential to military production. Consequently, controls imposed for national security purposes often have a significant impact on our members' ability to export much of the equipment they manufacture. NMTBA recognizes, however, that our nation's ability to maintain a defense-industrial edge over its potential adversaries is absolutely essential. Therefore, we and our members adamantly oppose any trade-related activity which would permit our adversaries to significantly and directly increase their military capabilities.

COCOM was established to ensure a degree of uniformity among the major Western trading nations' policies concerning the transfer of militarily critical technology. However, you may not be aware that many of our COCOM allies have adopted a decidedly more flexible interpretation of export controls than we have -- and, in fact, are engaging in sometimes blatant violation of agreements which are allegedly multilateral. These practices appear to be particularly prevalent in the machine tool industry.

Consider, for example, that approximately 25% of the world market (about half of the market outside the U.S.) for machine tools lies in the Communist countries. In 1981, the Soviet Union imported $1 billion worth of machine tools; the United States supplied only $17 million of that market. U.S. machine tool builders, then, are effectively denied access to about half of their potential export market. But comparable equipment, manufactured by other COCOM members, enters the Communist countries in clear violation of COCOM regulations. In 1981, for example, 88% of the machine tools going into the Soviet Union came from our Western allies (and fellow COCOM members). The U.S. share accounted for approximately 1.5%.

Although not all of these shipments were in violation of COCOM agreements, it is significant that the average unit value of the machining centers exported by Japan to the Soviet Union between 1979 and 1981 ($172,000 in 1979; $160,500 in 1980; $212,650 in 1981) was about twice as high than the average unit value of total machining center production during those years ($94,950; $93,900; and $101,400 respectively). It is obvious that machining centers of this value are highly sophisticated pieces of metalworking equipment. Many were of the type which our members are prevented from shipping.

Clearly, Mr. Chairman, if there is a leakage of machine tool technology to the Soviet Union, it most assuredly is not coming from the United States -- a fact that the Soviets themselves have acknowledged. Commenting on the likelihood that Soviet orders for machinery and related equipment from the U.S. would be even lower this year, an economist with the Soviet Ministry of Foreign Trade recently remarked: "Our image of the U.S. is not as an industrial nation, but as a supplier of farm products."[2] In that regard, an American representative of a U.S. international trading concern located in Moscow observed that "in fact, the Soviets have found alternate sources of supply [for machinery] and will be reluctant to ditch their new trading partners."[3]

The People's Republic of China provides another example of COCOM non-compliance. Chinese manufacturers (potential end-users of American machine tools) have visited our members' plants, only to find that export licenses could not be issued for the equipment they wished to purchase. Consequently, their orders were filled elsewhere -- by other COCOM members.

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[2] "Cash-Short Soviets Cool to U.S. Firms, But Moscow Nurtures Other Trade Ties," The Wall Street Journal, February 16, 1983, p. 34.

[3] Id.

When the U.S. complies with COCOM regulations, but our allies do not, export controls actually work to the detriment of the security of the free world -- in two ways. First, Communist Bloc access to militarily critical items is not denied. Second, our own critical industrial base is imperiled because the economies of scale utilized by our COCOM-violating competitors allow them not only to capitalize on the export market, but to flood our domestic market with imports as well.

Clearly, this situation demands that our government send a strong and unmistakable signal indicating that such conduct will not be tolerated. The Senate Banking Committee provided such a signal earlier this summer when it adopted a proposal authorizing, at the President's discretion, the restriction of imports into the U.S. as a means of deterring willful violations of COCOM regulations. This provision would apply only to those who fail to uphold their previously agreed upon obligations to deny potential adversaries access to militarily critical items. It should be retained in the bill.

III. NATIONAL SECURITY IMPORT CONTROLS DO NOT VIOLATE EXISTING TRADE LAWS

Statutory authority which allows the President to impose import restrictions under conditions which threaten to erode our nation's defense posture is clearly consistent with Article XXI of the General Agreement on Tariffs and Trade (GATT), which provides that:

> "[n]othing is this Agreement shall be construed . . . (b) to prevent any contracting party from taking any

> action which it considers necessary for the protection of its essential security interest . . . (ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment. . . . " (Emphasis added.)

As Professor Jackson has observed, this "language explicitly gives the right of determining necessity to each individual government."[4] Moreover, "[d]uring the discussion in the original GATT section, it was stated that 'every country must have the last resort on questions relating to its own security.'"[5]

In addition, NMTBA concurs with the Banking Committee's finding that this provision involves no extraterritorial application of U.S. law. Clearly, the United States has a sovereign right to govern the flow of imports inside its own borders, particularly from those who refuse to respect their own governments' agreement to restrict the transfer of militarily critical items to the Soviet Union and other potential adversaries of the entire free world.

IV. CONCLUSION

NMTBA believes that the national security import control provision goes to the very core of the compromise represented by S. 979. We join with the Banking Committee in hoping that both our government's efforts and the efforts of COCOM to achieve adequate enforcement of multilateral agreements will be successful, thereby making the imposition of import controls unnecessary. However, the threat of their imposition may well be the only effective tool to ensure that this is so. Experience has taught us that simple persuasion and endless negotiations have not been effective in assuring multilateral compaliance with multilateral agreements to control exports for the protection of the mutual security of the Western Alliance.

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[4] J. Jackson, World Trade and the Law of GATT § 28.4 at 748.

[5] *Id*. at 749, quoting GATT Doc. Cp.3/20, at 3 (1949).

As the Banking Committee has recognized, the United States has no obligation to keep its markets open to those who would endanger the national security of the United States and the free world by transferring controlled goods and technology to our potential adversaries. As a matter of fact, it could be legitimately argued that a fairly substantial portion of the massive defense authorization, with which the Senate so laboriously wrestled last week, could have been saved, had not the Soviet Union augmented its military capability through the purchase of Western technology from our allies.

NMTBA, therefore, believes that the deletion of the national security import control provision from S. 979 could prove to be a serious and dangerous omission, resulting in the ultimate impairment of the national security of both ourselves and our allies. We urge the Subcommittee to give its support to this crucial safeguard.

Thank you. We would be happy to respond to your questions.

Senator **Danforth**. Do you reject the argument that this would simply make our Cocom partners angry and we are relying basically on cooperation with them and this would be counterproductive?

Mr. **Mack**. Well, Senator, everything that we have tried over the years to achieve their compliance has not worked, partly because there really is not much bite in what has been the posture of our Government up to now. Cocom is housed, as you know, in a suite of offices in the basement of the annex to the U.S. Embassy in Paris. It has been less than effective in achieving its desired result. We would suggest that this provision may well be a very substantial incentive to achieving compliance by our allies. We realize that there is perhaps a difference of opinion in negotiating style. The style that says we should rely on moral suasion seems not to have been very effective. We think that this one may prove so.

Senator **Danforth**. Thank you very much, Mr. Mack.

That concludes the hearing.

Mr. **Mack**. Thank you, Mr. Chairman.

(Whereupon, at 12:56 p.m., the hearing was concluded.]

[By direction of the chairman the following communications were made a part of the hearing record:]

Electronic Industries Association

August 3, 1983

Mr. Roderick A. DeArment
Chief Counsel
Committee on Finance
Room #SD-219
Dirksen Senate Office Building
United States Senate
Washington, D. C. 20510

re: August 4 hearing before the
Subcommittee on International
Trade: Export Administration
Act Amendments.

Dear Mr. DeArment:

EIA is responding to Senator John C. Danforth's invitation, expressed in Press Release No. 83-167 of July 26, for written statements as to three provisions of the Export Administration Act Amendments of 1983 (S.979) which lie within the province of the Committee on Finance.

Attached is the full text of EIA's March 1983 statement to the Subcommittee on International Finance of the Committee on Banking, Housing, and Urban Affairs. In it were addressed two of the three provisions on which Senator Danforth now seeks comment. EIA's views are the same now as then.

EIA supports the provision in S.979 which would amend the Export Administration Act by authorizing the President to impose import controls against a country with respect to which he has imposed export controls based on foreign policy reasons.

As stated on page 14 of the attachment:

> "Also, it is our view that import controls should be imposed concurrently with the imposition of any foreign policy export controls. This will assure that a foreign country does not benefit from sales into the U.S. while foreign policy export controls are in effect. Special provisions could be made that would exempt critical commodities from any import ban."

EIA does not support the provision in S.979 which would amend the Export Administration Act by designating the Commissioner of Customs as the official with authority to enforce the Act, and to enhance the search and seizure powers of the Customs Service.

As stated on pages 17 and 20 of the attachment:

> "EIA supports keeping the export control function within the Department of Commerce."
>
> "EIA is concerned about the manner in which export control enforcement activities are being carried out. Activities such as the U.S. Customs Service "Operation Exodus" program have penalized legitimate exporters by detaining legal shipments for extended periods of time. It is apparent to industry that many local customs inspectors lack necessary technical expertise and that coordination between field inspectors and their Washington headquarters is not adequate. We are hopeful that the new DoC Office of Export Enforcement will work closely with Customs to reduce the time involved between the detention and the actual seizure or release of shipments.
>
> "Furthermore, we urge that the new law direct DoC and Customs to develop a certification program which would exempt responsible companies which have internal control programs and demonstrated records of compliance from routine inspections at ports of exit."

Please observe that I was the Association's witness at the March hearing in which the foregoing views were stated. If you have any questions, please do not hesitate to contact Alan B. Spurney of the Electronic Industries Association (457-4924) or myself (463-5230).

Sincerely yours,

Allen R. Frischkorn
(GTE Corporation)
Chairman of the Export
Controls Committee of the
EIA International Business Council

Attachment

cc: Alan B. Spurney

March 1983 Statement
on the
EXPORT ADMINISTRATION ACT
by the
Electronic Industries Association (EIA)

Mr. Chairman and Members of the Subcommittee, I am Allen R. Frischkorn, Jr., Assistant Vice President for Government Relations of GTE Corporation, and Chairman of the Export Control Committee of the International Business Council of the Electronic Industries Association ("EIA").

The Electronic Industries Association is a Washington based trade association which represents 400 American companies of all sizes ranging from small single-product businesses to large multinational corporations. EIA member companies are involved in the design, manufacture and sale of electronic components, equipment and systems. These products are marketed for governmental, industrial and consumer use.

A large number of EIA member companies are involved in the export of electronic products. In 1981, U.S. factory sales of electronic products were $114 billion of which $23 billion were exports. In that same year approximately 1.6 million Americans were employed in electronic manufacture. We estimate that at least 600,000 of these jobs are tied directly to exports.

Because of the importance of export sales to the electronics industry, EIA is very concerned with the administration of U.S.

export control laws. While EIA recognizes the legitimate needs of the U.S. to control exports for national security purposes, we are concerned that the present system of national security export controls too often presents an unwarranted disincentive to U.S. export sales. EIA believes that a number of changes can be made in the national security controls which will minimize the law's impact as a trade disincentive and still protect U.S. national security interests. EIA's specific proposals concerning national security controls are set forth under appropriate subheadings below.

EIA also questions the need for and effectiveness of foreign policy export controls as they are presently employed. EIA urges that additional limitations be placed on the exercise of such authority. EIA In addition, suggests a minor change in the U.S. antiboycott law. Finally, EIA is proposing a number of administrative reforms which it believes would make the U.S. export control laws less burdensome and thereby enhance the international competitiveness of U.S. companies. EIA urges that its suggestions for changes in the current law be adopted by Congress in its review of the Export Administration Act of 1979.

National Security Controls

Introduction

EIA supports the need for national security controls to prevent our potential foreign adversaries from gaining access to U.S. products and technology which could give them a significant military advantage. However, we believe that the present system of national security controls is overly broad and burdensome and should be modified substantially. We also believe that improvements can be made without having an adverse impact on our national security.

Controls Are Overly Broad. Many electronic products for commercial end-use are controlled for reasons of national security. Except for small dollar value shipments, strategic or "dual-use" items require a validated license when destined to any country in the world except Canada. We believe that the licensing requirements imposed for reasons of national security can be reduced substantially without affecting the integrity of the export control program.

This conclusion was echoed by a report published May 26, 1982, by the General Accounting Office (GAO) entitled, Export Control Regulations Could Be Reduced Without Affecting National Security.*/ The GAO report concluded that the present system is more a paper exercise than a control mechanism. GAO pointed out that in the fiscal year 1981, the U.S. licensing system processed

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*/ Report of the Comptroller General of the United States (GAO/ID-82-14), May 26, 1982.

64,518 applications for items controlled on the basis of national security. The applications were divided as follows:

57,212	Destined for non-communist countries
7,306	Destined for communist countries
64,518	Total

The report pointed out that the Department of Defense reviewed only 37% of the applications destined to communist countries and only 1.7% of the applications destined for free world countries. GAO noted that DoD reviews so few applications because the majority of dual-use items are low technology products that Commerce routinely approves with little or no review, while DoD is primarily concerned with high technology products and technology transfers. On the basis of this evidence, GAO concluded that almost half the export license applications received each year could be eliminated without affecting national security.

In its report GAO also concluded that license requirements for exports to United States' allies could be significantly reduced. In this regard, GAO noted that the Government had denied none of the 22,377 license applications processed for COCOM countries in 1979. As a result, we can only conclude that U.S. companies suffer competitively without an offsetting national security benefit.

EIA urges the Department of Commerce to consider establishing a special general license category authorizing exports to COCOM countries. In the past, similar proposals have been considered by the Government but never implemented. We understand that the failure of the Government to adopt such proposals is due, at least in part, to the fear of potential diversions of exports to the Soviet Union and other East Bloc countries. Apparently, the Justice Department is concerned that eliminating the validated license requirement would impair its ability to bring criminal actions against persons violating export control regulations.

We believe that implementing a new general license category for COCOM countries would not present an undue problem of diversion nor would it impair the ability of the Department of Justice to enforce the laws. Any system of multilateral controls must rely upon the cooperation of allied countries to be effective. Increasing the role of COCOM in policing national security controls would place emphasis on the multilateral aspects of controls. It would also enable the Commerce Department to shift manpower from administrative details to other more productive areas. With respect to the Justice Department's concern, it should be noted that the Government would still have a record of equipment shipped to COCOM countries because Shipper's Export Declarations are required for all shipments of $500 or more. In addition, if the Government feels it needs more information about general license shipments to COCOM countries it could impose special reporting requirements on exporters.

If the Act is amended to provide for a general license for COCOM countries it should further provide for the elimination of re-export controls for shipments among COCOM countries. Under the present law not only are shipments to COCOM countries required to be licensed but re-exports between COCOM countries must be licensed. In line with the proposal for eliminating the validated license requirements for COCOM countries, re-exports from one COCOM country to another should not require a license. Further, if the COCOM structure is strengthened as we suggest later in these comments, DoC should consider eliminating the re-export license altogether for shipments between COCOM countries and non-COCOM free world countries. Also, for the reasons set forth above, validated export license and re-export license requirements should be eliminated on a country-by-country basis with respect to those countries which agree bilaterally with the United States to implement an export control system similar in effect to the one administered by the DoC.

Finally, for the reasons noted in the GAO report, the Commerce Department should redouble its efforts to eliminate controls altogether on low-technology products and on products which no longer represent "state-of-the-art".

Technology Transfer. The Export Administration Act of 1979 mandates the development of new controls on militarily critical technologies and DoD is now refining its Militarily Critical Technologies List (MCTL). The basis for the MCTL is a perceived need to re-focus our control efforts on strengthening controls on technology and keystone equipment while de-controlling some products and non-critical technologies. EIA agrees that technology controls play a legitimate role in protecting national security. However, experience with the MCTL effort indicates that, rather than de-controlling end products and concentrating controls on technology as envisioned in the Bucy Report of February 4, 1976,*/ the Government appears to be developing a whole new system of technology controls on top of the current system of product controls. Moreover, the array of technologies currently on the MCTL appears to be far broader than that which is necessary to deny critical technologies to our potential adversaries.

This "combined approach" gives all the appearances of being even more burdensome and providing an even greater disincentive to U.S. exports. Moreover, to be effective, any controls on technology must be supported by our allies. Before unilaterally increasing controls on technologies, the U.S. Government should obtain the agreement of our COCOM allies to establish and enforce controls over agreed technologies which are militarily critical. The impact of increased controls on technologies appears to fall mainly on our allies since validated licenses would presumably be required for technology transfers to Free World countries, which transfers presently do not require a validated license. Under current law, technology transfers to the Soviet Union and other East-Bloc countries already require validated licenses.

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*/ An Analysis of Export Control of U.S.Technology-A DoD Perspective; Report of the Defense Science Board Task Force on Export of U.S. Technology; February 4, 1976.

With respect to increased controls on technology transfers, EIA concurs with the conclusions reached by the Rand Corporation in its April 1981 study entitled, Selling the Russians the Rope? Soviet Technology Policy and U.S. Export Controls. */ . In the study, which was prepared for the Defense Advanced Research Projects Agency (DARPA), Rand took a critical look at the assumptions and objectives of U.S. high-technology export control policy. A central conclusion of the Rand study was that the Soviets are failing to exploit the potential advantages of using western high-technology imports to meet domestic requirements in a productive manner. The study suggests that in areas targeted by the Soviets as high priority sectors (e.g., military) there

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*/ Selling the Russians the Rope? Soviet Technology Policy and U.S. Export Controls; Thane Gustafson; April 1981 #R 2649-ARPA; Rand.

is a clear need for export controls. The study goes on to note that in many areas, however, the Soviet ability to absorb technology is quite poor. Thus, on the basis of the Rand study's findings it would appear that the most useful application of controls would be on a limited number of technologies with fairly specific military applications. The blunderbuss approach currently embodied in the MCTL exercise seems to us to be too broad. The fact that the MCTL is overly broad, at least as initially proposed, is also supported by the findings of the Rand study (at page 4) cited above. Every effort should be made to limit the MCTL to only those technologies with clearly significant military implications. At the same time efforts should be stepped up to decontrol those products which embody low technology and which have only a remote or tangential military significance.

Foreign Availability. Section 4(c) of the Export Administration Act provides that export controls should not be imposed for national security or foreign policy reasons on items which are available without restriction from sources outside the United States in significant quantities and which are of comparable quality to U.S. products, unless the President determines that the absence of U.S. export controls could prove detrimental to the national security and foreign policy of the United States. This provision was strongly supported by industry the last time the Export Administration Act was up for renewal. However, it has been our experience that DoC has failed to fully implement the foreign availability provision. Specifically, DoC has failed to develop the internal resources necessary for making foreign availability determinations. We urge that the DoC be given more specific direction and resources so that it is able to gauge foreign availability. Obviously, it makes little sense to deny business to U.S. companies if our foreign competitors can and will supply similar products or technology to a foreign buyer.

Strengthening COCOM. As noted above, to be effective any system of export controls must be multilateral. It has been our experience that the COCOM system, which operates as a gentlemen's agreement, continues to operate to the detriment of U.S. suppliers. Since each of the COCOM members is relatively free to interpret the rules, in many instances foreign companies are permitted by their governments to make sales which the U.S. Government would not permit U.S. companies to make. To avoid this problem COCOM should be strengthened and, if possible, brought under a treaty framework to limit the ability of individual COCOM countries to make their own interpretations of the rules. An enforced uniform export control system is required.

Economic Impact. Section 3(2) of the Act requires that export controls be imposed only after a consideration of the impact of such controls is made on the U.S. economy. EIA believes that the process by which economic impact is considered should be strengthened. The availability of products or technology to a foreign adversary is only one aspect of national security. Another aspect of national security is a strong national economy and industrial base. The ability of U.S. companies to compete in international markets is crucial to the health of the domestic economy. Increased international sales could provide the financial resources to U.S. companies for the research and development which is essential if America is to keep its technological lead. In some cases, economic considerations may dictate abstaining from controls, particulary with respect to Free World countries. Indeed, given the existing international economic situation, we would anticipate that economic impact analysis should play an increasingly important role in determining whether export controls should be exercised.

Foreign Policy Export Controls

Introduction

Export controls applied for foreign policy reasons under the Export Administration Act of 1979 have not yielded a cost/benefit ratio favorable to U.S. interests. On the one hand these controls have imposed some additional costs upon target countries and communicated U.S. disapproval. In many instances, however, the controls have not achieved the foreign policy purposes for which they were intended, nor have they denied the target countries imports which could meet the same needs as the embargoed U.S. products. As adverse side effects, the controls have also imposed high and discriminatory costs on certain U.S. producers, damaged the ability of U.S. companies to compete in international markets, and harmed relations with U.S. allies.

EIA Questions the Need for Foreign Policy Control Authority. The President has a number of foreign policy instruments other than restricting exports which he can use to communicate U.S. disapproval of a foreign government's behavior. Examples include diplomatic representations, travel restrictions, cancellation of exchange programs, limitations on foreign assistance and commercial credits, and import restrictions. If a truly serious foreign policy emergency arises in which special controls over U.S. exports are needed, the President can (1) ask Congress for legislative authority to impose special controls which would enable the issue to be carefully examined, or (2) apply controls pursuant to the International Emergency Economic Powers Act (IEEPA). The President already has authority other than the EAA or IEEPA to carry out U.S. obligations pursuant to international agreements such as, for example, Section 5 of the U.N. Participation Act of 1945.

Limitations Should be Placed on the Exercise of Foreign Policy Controls. In the event the President's authority is continued, limitations should be placed on the President's discretion to invoke controls. Specifically, the existing criteria for imposing foreign policy controls should not be hortatory but mandatory. They should require the President to make a more compelling showing of need, effectiveness, foreign unavailability and to indicate why other foreign policy measures have not been effective. In addition, the criteria should include limitations on the unilateral imposition of foreign policy controls.

Further, export controls for foreign policy purposes should not apply to foreign nationals, including foreign subsidiaries and licensees of United States corporations. The damage to U.S. relations with its allies which resulted from the recent Siberian gas pipeline controls demonstrates that such extraterritorial application of controls can be counter-productive as well as ineffective.

Moreover, export controls for foreign policy purposes should not have retroactive application except in extraordinary circumstances. With respect to exports requiring validated licenses, once the license is issued it should not normally be subject to repeal or any further restriction. With respect to exports that fall within general licenses, new restrictions or license requirements should not affect existing contracts. Violation of the "sanctity of contracts" principle in the foreign policy export context is probably the most significant factor contributing to the view of foreign buyers that U.S. companies are not reliable suppliers.

Also, it is our view that import controls should be imposed concurrently with the imposition of any foreign policy export controls. This will assure that a foreign country does not benefit from sales into the U.S. while foreign policy export controls are in effect. Special provisions could be made that would exempt critical commodities from any import ban.

Finally, the EAA should require that the following procedures be followed with respect to the imposition of export controls for foreign policy purposes:

a. Prior to imposing export controls, the President must publish his intention to do so in the Federal Register. The Federal Register notice must include an announcement of a public comment period.

b. The Executive Branch must consult with Congress, hold public hearings, consider written comments and submit to the Congress a comprehensive report setting forth specific findings with respect to each of the criteria contained in the Act, before imposing export controls. If the President fails to follow any one of these procedures, the controls cannot be imposed.

c. If the President determines that the national interest requires immediate imposition of foreign policy export controls, he may postpone the consultations, hearings and comment period until after such imposition. The Executive Branch must, however, hold consultations and hearings, and commence the comment period within thirty (30) days of imposing the controls.

If these emergency procedures are invoked, the President must nevertheless submit to Congress a preliminary report prior to the imposition of controls. The preliminary report must reflect consideration of each of the criteria specified in the Act based upon the best information available to the President. It must also explain why consultations and hearings could not be held prior to the imposition of the controls. Any controls imposed prior to the submission of a preliminary report would be void and unenforceable. Within forty-five (45) days from imposition of the controls, the President must submit to Congress a final report setting forth specific findings with respect to each of the criteria contained in the Act. If the President fails to submit such a final report within forty-five days, the controls automatically expire.

d. All export controls imposed for foreign policy purposes expire after 180 days. If the President wishes to extend the controls beyond that time, he must again initiate the procedures outlined above.

Antiboycott Provisions

Unintentional Violations. The Export Administration Act should be amended in order to mitigate penalties in light of facts and circumstances, such as violations which are committed unintentionally by low-level employees without authorization by higher management and violations which are voluntarily disclosed by exporters. Currently, antiboycott provisions exist under two separate laws and, accordingly, are administered by two separate departments: Treasury and Commerce. Whereas, Treasury's regulations contain a provision (Guideline D.4) recognizing that unintentional violations which are against company policy can occur, Commerce's regulations do not.

Proposals for Administrative Reform

Introduction

EIA supports keeping the export control function within the Department of Commerce. We oppose proposals which would transfer the export control function to an independent agency or to the Department of Defense. The present system which divides responsibility between the Department of Commerce and the Department of Defense has worked reasonably well. Moreover, because of its trade promotion activities, DoC is uniquely qualified to objectively balance national security, economic and trade considerations.

EIA believes that there are a number of administrative changes which can be made to improve the export control process and to reduce the burden of the export control program on U.S. businesses. There are many administrative improvements which the Department of Commerce can make without changes in the law such as clarifying its regulations, reducing documentation requirements on some shipments and simplifying its forms. We would hope that DoC's efforts in this regard are continued and expanded. In addition, the creation of a general license for COCOM countries as suggested above should reduce the workload of the Office of Export Administration and thereby free resources for other activities. Set forth below are other administrative

changes which EIA believes should be incorporated into the new Export
Administration Act.

Increase the Resources of the Export Administration to Facilitate the Goal of Export Promotion. The new Export Administration Act should stress the importance of the national objective to increase exports. Indeed it should make clear that the goal of export promotion should be second only to the goal of the law to guard the national security interests of the United States. Sufficient manpower and resources should be made available to the Office of Export Administration to the maximum extent feasible, to expedite the consideration of license applications and to handle problem inquiries from exporters. In addition, sufficient resources should be made available to the Office of Export Administration to improve the training available to DoC licensing personnel and to make continued improvements in such areas as computerization. It is indeed ironic that one of the major export disincentive programs administered by the U.S. Government does not receive adequate financial resources to perform its responsibilities in the least burdensome manner possible. This should be corrected by more specific direction in the Export Administration Act and by sensitivity to the problem in the congressional appropriations processes.

Voluntary Disclosure Policy. Industry is concerned about recent penalties assessed against companies making voluntary disclosures of export violations. In an effective control system, we believe industry and government must work closely together and communicate openly. EIA believes that to the maximum extent possible, DoC should promote voluntary compliance by responsible companies and encourage companies to make such disclosures. Specific authority to mitigate penalties when violations are voluntarily disclosed would encourage such behavior. Such a program could be modeled after the successful "Prior Disclosure" program of the U.S. Customs Service set forth in 19 CFR §162.74. If this concept is accepted, written guidelines should be published in the Federal Register.

Judicial Review. The procedures for judicial review set forth in Section 10(j) do not provide for meaningful administrative advocacy proceedings. EIA believes that exporters should have a right to appeal DoC administrative decisions, including decisions relating to CCL classifications, statutory procedural requirements, administrative penalties and foreign availability to an independent body such as the Court of International Trade. The standard for review of such cases would be whether the action of the Office of Export Administration is arbitrary, capricious or otherwise not in accordance with the law.

Enforcement Activities. EIA is concerned about the manner in which export control enforcement activities are being carried out. Activities such as the U.S. Customs Service "Operation Exodus" program have penalized legitimate exporters by detaining legal shipments for extended periods of time. It is apparent to industry that many local customs inspectors lack necessary technical expertise and that coordination between field inspectors and their Washington headquarters is not adequate. We are hopeful that the new DoC Office of Export Enforcement will work closely with Customs to reduce the time involved between the detention and the actual seizure or release of shipments.

Furthermore, we urge that the new law direct DoC and Customs to develop a certification program which would exempt responsible companies which have internal control programs and demonstrated records of compliance from routine inspections at ports of exit.

Conclusion

EIA firmly believes that the changes which it has suggested herein will lessen the burden of U.S. export control laws without having any adverse impact on the national security of the United States. Indeed a healthy national economy is one of the most important factors of national security. Without the increase of exports necessary to earn the profits essential for continued research, development and innovation, U.S. companies could well lose their technological edge. In today's world economy it is more important than ever to maximize our commercial opportunities. The goals of export promotion and national security need not be mutually exclusive. EIA believes that the adoption of its proposals will assure that both goals can be achieved.

CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA

HILTON DAVIS
VICE PRESIDENT
LEGISLATIVE AND POLITICAL AFFAIRS

1615 H STREET, N.W.
WASHINGTON, D. C. 20062
202/463-5600

August 4, 1983

The Honorable John C. Danforth, Chairman
International Trade Subcommittee
Committee on Finance
United States Senate
Washington, D. C. 20510

Dear Mr. Chairman:

I would like to express our appreciation to you and the members of the Finance Committee for your active interest in the import control provisions of S. 979, the Export Administration Act Amendments of 1983. As these provisions constitute new and significant trade control authority, we believe that they deserve careful review.

First, S. 979 provides that, whenever the President imposes export controls on a country for foreign policy purposes, he is also authorized to impose controls on imports from that country. The Chamber has consistently argued the need to fashion the most effective set of economic tools to assist the President in the implementation of this country's foreign policy. Import controls are one such tool.

The Chamber has also taken the position that such authority should be resorted to in only the most serious situations. As such, we would prefer to see such authority used only pursuant to international emergency powers legislation or in accordance with specific legislative authority, as was the case in 1978 when the United States suspended imports from Uganda. Unless there are major constraints imposed on this authority, we risk creating a potent protectionist instrument. Moreover, it is extremely important that such authority not create conflicts with our obligations under the General Agreement on Tariffs and Trade.

Second, S. 979 authorizes the President to impose import controls for violations of U.S. national security controls or any regulation issued pursuant to a multilateral agreement to control exports for national security purposes. The Chamber has been a strong advocate of strengthened enforcement authority to deal with national security export control violations. However, if Congress determines that import controls are a necessary enforcement tool, it is important that the authority be carefully delineated to avoid any possible use to restrict imports for reasons other than obvious violations of security controls.

In this regard, it is important that S. 979 be clarified to state that import restrictions would apply only to those persons and companies that violate U.S. national security controls and not be interpreted to restrict imports from a country as a whole. As with other civil penalties and sanctions under the Export Administration Act, it is important that import sanctions also be subject to judicial review.

Finally, it is crucial that we do not create a new and volatile source of division within the Western alliance by the unilateral use of import controls. Consequently, the Senate should consider the inclusion of a requirement that the United States consult with the country in which the export violation has occurred prior to the imposition of import controls.

I hope these thoughts will be useful as the Finance Committee examines the appropriateness of import controls for the furtherance of U.S. foreign policy and national security interests. Should you wish an elaboration of any of our views, please do not hesitate to contact our specialist on the issue, Don Hasfurther, 463-5482.

And, I request that this letter be made a part of the hearings record.

Cordially,

Hilton Davis

Hilton Davis

cc - Subcommittee members
Mr. Leonard Santos
Mr. Jeffrey Lang

STATEMENT OF THE
INTERNATIONAL BUSINESS MACHINES CORPORATION
ON S. 979
TO THE SENATE COMMITTEE ON FINANCE

IBM is pleased to have this opportunity to express our views on S. 979, legislation sponsored by Senator John Heinz, which amends and re-authorizes the Export Administration Act of 1979. We are particularly pleased that the Finance Committee has requested referral of the bill to consider its import controls sections. We believe these provisions under Sections 6 and 9 of the bill are ill advised and so broadly stated that they represent a real threat of protectionism.

S. 979 -- THE LEGISLATION

Before commenting on the import control provisions, we would like to compliment Senator Heinz, Senator Garn, and the remainder of the Senate Banking Committee for reporting a fundamentally sound and well-balanced piece of legislation which we support. We are particularly pleased with several key provisions:

1. Contract Sanctity Under Export Controls: S. 979 requires that contracts already in effect before the imposition of export controls for foreign policy reasons may not be revoked in whole or in part. This provision is the backbone of the bill, and we strongly urge the Senate to retain this provision in the exact form in which it emerged from the Banking Committee. IBM's ability to meet our contractual obligations is particularly important, as we must be able to deliver not only the equipment which has been ordered, but also the follow-on service, including maintenance, which we have committed and which is essential to our ability to compete. We would strongly oppose any effort to weaken or delete this fundamental principle.

2. COCOM Licensing Status: S. 979 requires that only general licenses be required for exports of goods or technology to countries which are party to a multilateral or bilateral agreement with the United States. An exception is provided in the case of militarily critical technologies which are controlled for national security reasons, in which case the Secretary of Commerce may require an individual or multiple license. IBM

regards this as a very useful approach since well over half of the almost 3,000 export license applications we filed last year were for destinations in COCOM member countries. Not only will this provision greatly ease our licensing paperwork and reduce delays in licensing, it will also send a clear signal to U.S. allies of our trust in them. We are supporting those provisions of the bill designed to strengthen COCOM (except import controls) and strongly endorse measures designed to encourage a multilateral system of controls. We would only add here that the amendment sponsored by Senator Mattingly during the markup providing for multiple licensing on MCTL exports to COCOM is essential to retain.

3. Comprehensive Operations License (COL): S. 979 provides for the creation of a new multiple license for militarily critical technologies -- the Comprehensive Operations License. While it is true that a COL could be created under existing law by regulation, our experience indicates that a clear statement of Congressional intent about such a new licensing system is required to ensure that it is created as expeditiously as possible. Without the COL, existing and proposed regulations governing the flow of militarily critical technologies would be extremely burdensome and severely impair our ability to transact even routine international business within IBM.

IMPORT CONTROLS -- THEIR EFFECT ON IBM

We are concerned about the import control provisions of S. 979 which are the subject of the Senate Finance Committee's hearings, since we believe they offer considerable potential for abuse in the form of blatant protectionism. Given the language in the current bill, the Export Administration Act could become an instrument for controlling trade not for national security, foreign policy, or short supply reasons, but for economic leverage to protect a U.S. industry from foreign competition.

To appreciate IBM's concerns, it is necessary to understand the nature of IBM's business and that of the information handling industry. IBM is one of the world's largest manufacturers and marketers of information handling systems, products and services. In 1982, IBM had over $34 billion in gross income worldwide -- almost half of which came from our international operations.

IBM offers its customers around the globe a broad, worldwide product line -- one that is highly complex and the product of the collective input of our people, their ideas, their advanced materials, and technologies. To lower our standards in any of these areas would soon mean a degradation of our performance, reliability, and quality. We could not achieve our goal of being the low cost producer. In order to retain our leadership role in a fast-changing, highly competitive industry and be the low cost producer, we must avail ourselves of the best possible products and services worldwide for our product lines.

We procure products and services from over 150,000 vendors worldwide, more than two-thirds of which supply our overseas subsidiaries. Most of these are specifically for manufacturing operations. IBM has a sophisticated worldwide procurement network to assure that we obtain the highest quality goods and services at the lowest cost.

Thus, while we are, on balance, a net exporter from the United States, we also rely on foreign and domestic suppliers for our manufacturing, research and development operations -- both in the United States and abroad. Without access to these suppliers, we could not meet our business objectives in the most efficient manner possible.

S. 979's import control provisions raise serious doubts about our ability to continue these operations. As stated in the bill under Section 6 (1) and Section 9 (7), the President's authority to impose such controls is excessively broad and constitutes a disturbingly easy avenue through which protectionist actions can be imposed.

FOREIGN POLICY IMPORT CONTROLS UNDER SECTION 6

IBM strongly opposes the proposed import controls for foreign policy purposes under Section 6 and urges the Senate to delete this unsound provision. The section would authorize the President to impose import controls whenever he imposes export controls against another country for foreign policy reasons. We oppose the provision for the following reasons:

1. Extraterritoriality and Content: The reach of S. 979 is unclear. As noted earlier, IBM has numerous procurement offices around the world to help supply our manufacturing operations. We are concerned about the situation where one of our manufacturing subsidiaries abroad procures products or services from a supplier located in a country against which the U.S. has applied export and import controls. The legislation is so broadly stated in its current draft that it fails to address the following questions:

    a) Would the IBM manufacturing subsidiary be allowed to procure the product or service despite the absence of any U.S. legal jurisdiction over the foreign subsidiary's procurement from the sanctioned country?

b) Assuming the answer to question (a) above is negative, what controls, such as content requirements, would be placed on shipments from the IBM subsidiary to IBM in the U.S.? Would re-shipments by the IBM subsidiary from the embargoed country to the U.S. be allowed?

If such controls were placed on imports from our subsidiaries, or if content rules were crafted to apply to the import into the U.S. of goods or technology from the embargoed country, this would constitute an extraterritorial application of U.S. law. It would have the effect of requiring nationals of a third country to comply with U.S. law. As such, we are concerned about its effect on our overseas employees. Conversely, if no such controls are to be placed on the subsidiary, then this merely demonstrates the ineffectiveness of import controls.

2. Sanctity of Contract Under Import Controls: S. 979 clearly recognizes the principle of sanctity of contract by requiring the President to honor contracts already in force before the application of export controls for foreign policy reasons. Unfortunately, no similar provision is incorporated into the import control proposal. This would raise doubts with our suppliers about IBM's reliability in performing its contractual obligations as a customer.

3. GATT Legality: Under Secretary of Commerce Lionel Olmer testified before the Finance Committee on August 4th that the Commerce Department believes import controls levied under Section 6 against any of the 88 GATT members would clearly be illegal. He noted that the Administration is examining the situation of non-GATT member countries. IBM firmly supports the GATT agreements and would oppose any measure that would refute or conflict with U.S. obligations under those agreements.

4. Lack of Consideration: Import controls, which are under the jurisdiction of the Finance Committee, would constitute an entirely new concept of U.S. international trade law. As such, we do not believe the Finance Committee has been given sufficient time to consider the issue. Export controls constitute numerous pages of U.S. law, whereas import controls, as authorized under the current Banking Committee,bill, constitute but a few lines. We believe the Finance Committee should insist that the provision be deleted.

In summary, IBM believes the foreign policy import control provision of S. 979 is unclear, unsound, and unnecessary. It would also allow the Export Administration Act to become an instrument of U.S. protectionism, which must be avoided. IBM opposes the section and urges the Finance Committee to delete it.

NATIONAL SECURITY IMPORT CONTROLS UNDER SECTION 9

We have similar concerns about the provision under Section 9 of S. 979 which would allow the imposition of import controls against "whoever violates" either U.S. export controls under Section 5 of the Act, or any regulation issued pursuant to a multilateral agreement to control exports for national security purposes to which the U.S. is a party (i.e., COCOM). We would prefer to see this provision also deleted. Again, the language of this provision is so broadly drawn that it raises the following serious concerns for IBM:

1. Coverage: The bill does not define the term "whoever violates," which raises questions about the extent of coverage against alleged violators. First, we ask who bears responsibility for a violation by an individual employee of a company -- whether willful or unintentional. If a company employee violates an export control without the knowledge and approval of his management, would that company nevertheless be subject to import control?

   Second, we ask about the complexity of today's multinational corporations. Suppose the Japanese machine tool manufacturing subsidiary of a large conglomerate company shipped a good or technology in violation of the export control regulations of the U.S. S. 979 does not clearly state Congressional intent that the sanction be confined to the subsidiary itself. Thus, a technical or inadvertant violation could cause the entire conglomerate to be sanctioned. The fact that another, unrelated subsidiary provides semiconductors or ball bearings or some other critical component of our manufacturing needs is not taken into account. This would hurt IBM and other U.S. high technology consumers of the imported goods.

2. Cost Analysis: S. 979 has no requirement that the President consider the economic or national security cost to the United States of imposing import controls. Further, no means to comment on proposed controls by interested parties or the public is permitted. We believe consumers of foreign products should be allowed to present their case to the U.S. Government to enable the President to make a cost/benefit analysis of the proposed sanctions.

We also note that in its zeal to punish violators of U.S. national security controls, the U.S. Government should not lose sight of the possibility that the nation's security itself could suffer, as well. As a high technology company involved in the information handling business, IBM is keenly sensitive to the military applications of our business line and is concerned about the strategic implications that a cut-off in imports of certain key components and sub-assemblies could entail for the United States. In other words, such a policy would be penny-wise, but pound foolish.

3. Specificity on Size of Penalty: Discretion on the size of the penalty is left with the President under S. 979. However, in the situation we described in (1) above where the U.S. is facing severe competitive pressures from another country, we see no safeguards to require that the severity of the penalty fit the violation. Clear policy direction is needed here as, again, the threat of protectionism raises significant concerns.

4. COCOM Authority: The justification given for this provision is that COCOM, as a voluntary, non-treaty organization, has little strength and needs some enforcement mechanism. COCOM is alleged to have allowed shipments of sensitive goods or technology to potential adversaries, when U.S. controls would have prevented the export. However, we have never been able to verify that computers and related equipment or technology have been shipped over U.S. objection. We cannot speak for other industry sectors, but we do note that the U.S. Government has the power to block COCOM approval. Therefore, we simply do not believe that any case has been made for including this provision.

CONCLUSION

In view of the foregoing, IBM urges the Senate to delete the import controls under Section 6 of the Act which S. 979 would authorize. We feel, similarly, that the national security import control provision should be deleted. If this is not possible, the problems we have addressed should be resolved. Furthermore, we believe that import controls, if necessary at all, should be applied multilaterally. In other words, if the intent is to strengthen COCOM, then the President should be required to enter into negotiations with other COCOM members to strengthen the organization by providing for multilateral import controls, when appropriate, for violations.

We also believe the President should exhaust all other appropriate actions before imposing import controls. For example, the imposition of export controls through the denial list, when published in the Federal Register, could include a notice that the U.S. Government is considering the imposition of import controls against a violator. This notice should be given promptly, but also published widely to give notice to customers of the alleged violator and others who have an interest in or could be affected by the proposed sanction.

Mr. Chairman, we reiterate our belief that the Senate Banking Committee has reported a fundamentally balanced piece of legislation which we support. We are particularly gratified by the provisions in S. 979 providing for contract sanctity, general licenses for COCOM transactions, and the Comprehensive Operations License. However, we believe that the inclusion of import controls for both foreign policy and national security reasons is unnecessary. We fear such controls would send the country into unexplored territory without adequate consideration of all the various consequences. In this statement, we have attempted to explore some of these unwanted consequences and hope the Senate will take our concerns into account as it completes action on the bill.

NAM
National Association
of Manufacturers

ALEXANDER B. TROWBRIDGE
President

August 3, 1983

The Honorable John C. Danforth
Chairman, Subcommittee on
International Trade
United States Senate
G32 Dirksen Office Building
Washington, D.C. 20510

Dear Senator Danforth:

On August 4, the Senate Finance Subcommittee on International Trade will hold hearings on S. 979 -- The Export Administration Act of 1983. We have a number of concerns about this legislation and its effects on U.S. international competitiveness. One of the subjects of particular concern to us are the provisions in S. 979 dealing with import controls.

The legislation provides the President with authority to impose import controls against:

1) foreign firms violating U.S. and/or Cocom export controls; and -

2) nations which are the target of U.S. export control sanctions.

For different reasons, NAM is troubled by each of these import control provisions and we would like to take this opportunity to provide for the record our views on this issue.

With regard to import controls against foreign firms violating Cocom or U.S. control laws, the U.S. must recognize the fact that we cannot "police" the world, enforcing our own control policies whenever and wherever we like. This particular provision of S. 979 is seen by its proponents as a "tool" to strengthen Cocom by forcing our allies to choose between U.S. interpretation of control policies, on one hand, or access to the U.S. market, on the other. In fact, this provision could ruin Cocom, which after all is a voluntary organization designed to coordinate allied policies regarding national security controls. It certainly will lead to more than a little reluctance on the part of other countries to see items placed on the Cocom list.

The history of U.S. export control policies is replete with examples of the U.S. aiming at the Russians and hitting the Atlantic alliance. I am afraid this provision is very much in that tradition.

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As for import controls against those who are the target of U.S. export controls, nations are generally more concerned about markets than sources of supply. The U.S. market, of course, is the largest single market in the world. Therefore, if our object is to reinforce foreign policy objectives with economic sanctions, the logic for resorting first to import controls is appealing. We should bear in mind, however, that in an interdependent world restrictive import policies will hurt U.S. industry almost as surely as embargoes on exports.

Under S. 979, once the President's authority to use import controls has been triggered there are few constraints on the use of this authority. The President, for example, would not be required to determine that import controls would achieve their intended purpose or how the controls might affect U.S. consumers and producers using the imported products. We are very reluctant, therefore, to see yet another weapon added to the arsenal of U.S. economic sanctions.

In sum, NAM does not favor the import control provisions contained in either the national security or foreign policy provisions of S. 979. I should note, however, that we do support other provisions of the bill especially in the foreign policy section. We hope that the import control issue can be resolved without unduly jeopardizing those provisions of the bill which represent a distinct improvement over current U.S. export control law.

Sincerely,

AB Trowbridge

Alexander B. Trowbridge

cc: Senator Robert Dole
Senator Russell B. Long